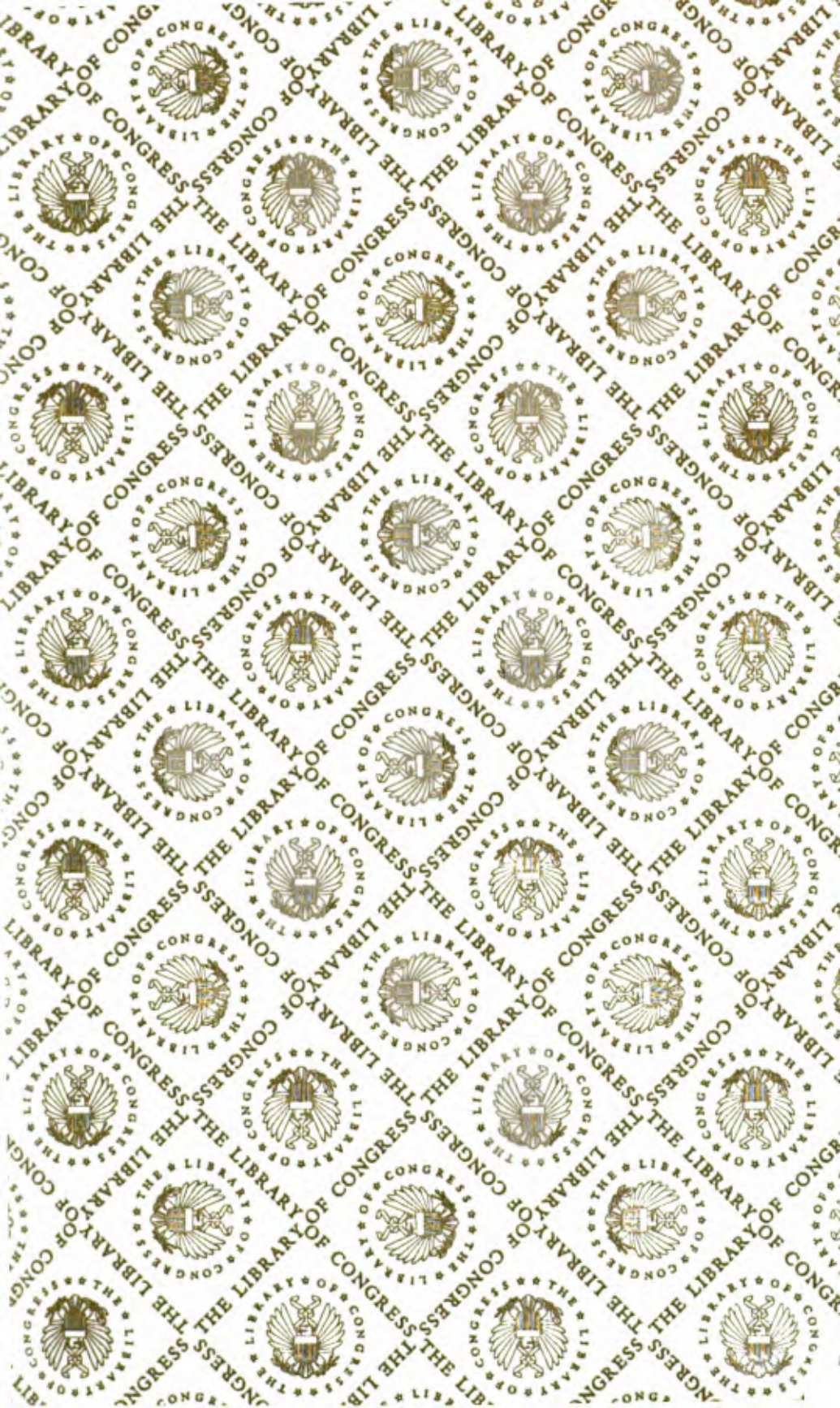
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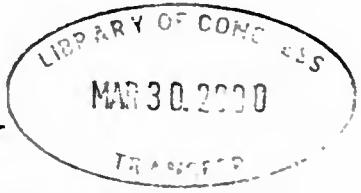
MASS TORTS AND CLASS ACTION LAWSUITS



HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS AND INTELLECTUAL PROPERTY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTH CONGRESS

SECOND SESSION

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THURSDAY, MARCH 5, 1998

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS AND
INTELLECTUAL PROPERTY,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to call, at 10 a.m., in Room 2141, Rayburn House Office Building, Honorable Howard Coble (chairman of the committee) presiding.

Present: Representatives F. James Sensenbrenner, Jr., Bob Goodlatte, Bill McCollum, Charles T. Canady, John Conyers, Jr., Howard L. Berman, Rick Boucher, and William D. Delahunt.

Staff Present: Blaine Merritt, Majority Counsel; Mitch Glazier, Majority Chief Counsel; Eunice Goldring, Staff Assistant; Robert Raben, Minority Counsel and Samara Ryder, Minority Counsel.

OPENING STATEMENT OF CHAIRMAN COBLE

Mr. COBLE. Good morning ladies and gentlemen.

The subcommittee will come to order. Today, we will conduct an oversight hearing on the issue of mass torts and class action suits.

An increasing number of legal scholars, attorneys, industry representatives, and consumer advocates believe that the current state of mass torts advocacy, especially as it relates to class action, does not advance the interest of litigants or society at large.

While the particulars vary from case-to-case, critics of the status quo maintain that many of the class action suits filed today are either frivolous or invite collusion among the affected attorneys.

Legal frivolity is a straightforward concept. It suggests that, as a practical matter, a given suit is meritless. Defendants are then compelled to settle for nuisance value.

Equally, if not more disturbing is a phenomenon in which suits of some inherent worth are settled on the cheap, and at the expense of genuinely injured plaintiffs.

In these cases, the defendants collude with the plaintiff attorneys in many instances in a variety of ways that limit the former's liability in exchange for enriching the later.

We will doubtlessly hear from our witnesses today of real life cases in which injured plaintiffs received compensation along the lines of redeemable coupons for their inclusion in a certified class, while their attorneys made off with millions. I emphasize that our hearing today is oversight in nature, and that any issue germane to our topic is fair game for discussion among members and witnesses.

That said, the great majority of commentary received by the subcommittee prior to this hearing focused on class action abuses; especially those occurring at the State level of adjudication.

Finally, this is not a legislative hearing. We do not have a bill before us to critique, as you all know. However, in addition to fleshing out some of the problems that are a part of the mass tort and class action environment today, we may explore some solutions that could be included in a bill that may be drafted at a later date; especially if a subcommittee coalition develops on acceptable content.

I see our ranking member of the subcommittee is not here, but we are pleased to have the ranking member of the Full Committee, the Gentleman from Michigan, Mr. Conyers.

[The prepared statement of Mr. Coble follows:]

PREPARED STATEMENT OF HON. HOWARD COBLE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NORTH CAROLINA, AND CHAIRMAN, SUBCOMMITTEE ON COURTS AND INTELLECTUAL PROPERTY

Good morning. The Subcommittee will come to order.

Today we will conduct an oversight hearing on the issue of mass torts and class-action suits. An increasing number of legal scholars, attorneys, industry representatives, and consumer advocates believe that the current state of mass torts advocacy, especially as it relates to class actions, does not advance the interests of litigants or society at large.

While the particulars vary from case to case, critics of the *status quo* maintain that many of the class-action suits filed today are either frivolous or invite collusion among the attorneys involved. Legal frivolity is a straightforward concept; it suggests that, as a practical matter, a given suit is meritless. Defendants are then compelled to settle for nuisance value. Equally if not more disturbing is a phenomenon in which suits of some inherent worth are settled on the cheap and at the expense of genuinely injured plaintiffs. In these cases, the defendants collude with the plaintiff attorneys in a variety of ways that limit the former's liability in exchange for enriching the latter. We will doubtlessly hear from our witnesses today of real-life cases in which injured plaintiffs received token compensation, such as redeemable coupons, for their inclusion in a certified class while their attorneys made off with millions.

I emphasize that our hearing today is oversight in nature, and that any issue germane to our topic is fair game for discussion among Members and witnesses. That said, the great majority of commentary received by the Subcommittee prior to the hearing focused on class action abuses, especially those occurring at the state level of adjudication.

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I now turn to the Ranking Member of the Subcommittee, Mr. Frank, for his opening remarks.

Mr. CONYERS. Good morning, Chairman Coble.

Mr. COBLE. Good morning, sir.

Mr. CONYERS. Our distinguished witnesses, judges and professors, members of the legal community, and business people.

This oversight hearing on mass torts and class action lawsuits is one that continues to have a compelling interest because it is a very important part of the legal process.

As you know, judges in the tobacco settlement, one of the tobacco industry's requirements for that settlement to be effectuated is that all future persons injured give up their right to a class action. I wonder why?

I mean, not only to a class action, Mr. Chairman, but to joinder as well. Well, I guess, that maybe is in the fine print. Maybe it does not mean so much. I would be interested in any comments that anybody might have in that regard.

So, I am very pleased. Are you going back to your mark-up? Could I yield to you now because I am going to be hanging around.

Mr. FRANK. Yes, if you could. Thank you.

I just wanted to come to apologize because the Banking Committee, on which I serve, will be marking up the bill authorizing funding for the International Monetary Fund starting right now. So, I am afraid that is going to take my time. I just wanted to come and apologize to you and express my interest in the subject matter. I will be following what was said. Thank you, Mr. Chairman. Thank you, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Frank.

Incidently, too, Chairman Coble, there has been a great, maybe not a great deal, but a lot of interest and activity on this subject since the Republican leadership in the House has taken over a couple of terms ago.

We have had some legislation on this subject, which I will be able to remind the panel about as soon as our staff pulls it up. So, this is an area that is in some change. There has been some change already.

It sounds like we may be getting ready for some more change. Class action lawsuits, what do they do? Allow victims of malfeasance, with limited resources, to take on corporations who frequently have far more resources.

So, if this is going to be a set of hearings in which we have anecdotal lapses of ethical lapses on the part of plaintiff lawyers, that is wonderful. We can fill this up. We have got a lot of room for space to fill this up, as any blame falls on plaintiff lawyers who are not insulated from any problems.

I think we need to examine, and I will be looking to hear about the corporate defendants who are often the motivating force behind these settlements. The corporate defendant, aware of the fact that it has manufactured, marketed, and sold a defective product and wants to liquidate its liability as quickly as it can.

Much of the blame for collusive settlements should be borne or maybe this hearing will prove it will be borne by companies that benefit from them who often willingly pay inflated fees to plaintiffs' lawyers to, of course, encourage their participation.

Ford Bronco II settlement, case in point. That is right, Detroit. This settlement awarded almost nothing to the class members and provided a very large fee to the plaintiffs' lawyers and a very broad release from liability to the Ford Motor Company.

This settlement is a great example of how the judiciary is best equipped to stop collusion. The district judge explicitly rejected the settlement agreement because of the likelihood that there was collusion between the corporation and the attorneys.

There are some other things that I want to talk about, Mr. Chairman, but because the witnesses, especially my colleague from Virginia, probably has more than one hearing waiting for him, I will ask unanimous consent to have my entire statement reprinted in the record.

Mr. COBLE. Without object, Mr. Conyers.

Mr. CONYERS. Thank you.

Mr. COBLE. We are pleased as well to have joining us today, Mr. Delahunt, the Gentleman from Massachusetts and Mr. Rogan, the Gentleman from California. Do either of you have an opening statement?

Mr. DELAHUNT. (Microphone not on.)

Mr. COBLE. We will hold him harmless for that.

Mr. ROGAN. This being my first hearing as a member of this subcommittee, Mr. Chairman, having just been selected 2 days ago, I am prepared to waive opening statement for two reasons.

First, I am anxious to hear the testimony. Second, it reflects my continuing effort to ingratiate myself with the chairman. So I thank you for the opportunity, but I will defer.

Mr. COBLE. You do not have to waive opening statement for that purpose.

Mr. DELAHUNT. You can always ingratiate here.

Mr. COBLE. Folks, as you all can see, we are a folksy group here and generally get along pretty well. We are pleased, indeed, to have the first panel seated, as well as those in the audience.

Now, each of you panel members will recall that you were asked, in earlier correspondence, to confine your oral statements to 5 minutes.

We are not going to buggy whip anybody if you go beyond the 5 minutes. In the interest of time, we are all on a short leash. I suspect you all are as well. When you see that red light illuminate before you, that is your signal that time has expired and we will be appreciative if you can lash her down for sea, as we sailors say.

The first witness on our panel, our first panel, is Richard Thornburgh who has served as Governor of Pennsylvania, Attorney General of the United States, and Under Secretary General of the United Nations during a public career which span more than 25 years.

He is counsel to the Pittsburgh-based law firm of Kirkpatrick and Lockhart and his Washington, D.C. office. Mr. Thornburgh was educated at Yale University where he obtained an engineering degree, and at the University of Pittsburgh School of Law where he served as editor of the Law Review.

Our second witness is the Honorable Anthony J. Scirica who is Circuit Judge. I knew how to pronounce that, Judge. I just momentarily stumbled.

He is Circuit Judge on the United States Court of Appeals for the third circuit. Judge Scirica is also a Member of the United States Supreme Court's Advisory Committee on Civil Rules.

He practiced law in Montgomery County, Pennsylvania where he also served as an Assistant District Attorney, and as a Judge of the Court of Common Pleas.

In 1984, he was appointed United States District Judge for the Eastern District of Pennsylvania, and in 1987 to the Court of Appeals. Judge Scirica was a Fulbright Scholar who has graduated from Weseley University in 1962, and the University of Michigan Law School in 1965.

Our next witness is John P. Frank who is partner with Lewis and Roca in the Special Litigation Group. His extensive experience includes the areas of appeal, civil litigation, and anti-trust.

Prior to joining the firm in 1954, Mr. Frank served as law clerk to Mr. Justice Hugo L. Black during the October 1942 term of the United States Supreme Court.

He also was assistant professor of law at Indiana University from 1946 to 1949, and associate professor of law at Yale University from 1949 through 1954.

Our final witness on this panel will be Susan P. Koniak who is a professor at the Boston University School of Law. Ms. Koniak was appointed in May 1993. She is an expert witness on legal ethics.

She received her J.D. degree from the Yale Law School in 1978 and her B.A. in 1975, magna cum laude, from New York University.

Our final witness, who will be the first to testify, I think because of another hearing you may have going on now, Jim, is the Honorable Jim Moran who represents Northern Virginia. I have never known where you and Mr. Wolf cross paths; where one terminates and the other one begins, Jim, but he nonetheless represents Northern Virginia in the Congress serving your fifth term, Jim?

Mr. MORAN. Yes.

Mr. COBLE. Good to have you with us.

Lady and Gentlemen, we have written statements from all of the witnesses on this panel, which I ask unanimous consent to submit into the record in their entirety.

Again, I appreciate you all being here. Now, the fact that we are asking you to confine your oral statement to 5 minutes does not mean that your written statement will be summarily trashed into the circular file.

We have your written testimony and it will be examined thoroughly, and some have already been examined thoroughly. So, Jim, we will start with you.

STATEMENT OF HON. JAMES P. MORAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA

Mr. MORAN. Well thank you very much, Chairman Coble.

My friend, Mr. Rogan, you are obviously going to go far on this committee. Charles, you missed his opening statement, which was to make it clear that the chairman rules. You probably advised him on that.

Chairman Conyers, thank you for your remarks and thanks for sitting in on this hearing. Bill, as a former State District Attorney, I know you are very intimately familiar with these issues.

What I want to talk about is abuse of justice. It is not a matter of taking away the rights of legitimate plaintiffs to file cases. It is not a matter of precluding the opportunity to sue tobacco companies, or auto manufacturers, or any other defendant. That is not what we are talking about here.

We are talking about empowering the role of the Federal courts and the rights of defendants. We are talking about reforming one aspect of the judicial system that I think has recently gotten off track in terms of serving the public interest.

All of us, we could spend all day long talking about these frivolous lawsuits. It is a cottage industry.

Everyday, there is a new frivolous lawsuit. You know, there is that recent one where a woman pulled down a box that had a blender in it. It was a pile of boxes. She takes the bottom one. The pile falls on her head. So, she sues the grocery chain.

We have another one where a guy that has been smoking all of his life sues the Washington State Dairy Farmers because they did not tell him that drinking a glass of milk everyday could clog his arteries.

You know, we could go on and on about these things. We could go on about the fact that plaintiffs, many times, are not well-served by the lawyers that bring these class action lawsuits.

I was a stock broker for 10 years. I had one case where I sold thousands of stocks of this new issue. It turns out that all of the claims were misleading. So, when we found out at the end of the day, I tried to get my clients out.

The lawyers had enjoined the firm from allowing any of the stock to be sold. So, there was about $26 million caught up. No one could get out of it. It turns out that this went on for 3 years.

We finally got back 34 cents per share for $26 invested because the lawyers had spent it all without even advising any of the plaintiffs that had bought the stock. These kinds of things have gotten out of hand.

It is not defensible.

I am reminded of the Bank of Boston case, that I think was mentioned. A lawyer sued on behalf of the depositors in the Bank of Boston. They did not even know about it until they got a check for $9.16 apiece.

The depositers sued because their account was reduced. Then the lawyer turned around and sued them for $25 million for defamation of character. I know no member of this panel want to support that type of thing.

So, what we want to address is the fact that by any objective measure, the State class action lawsuits have become the weapon of choice for many within the plaintiff's bar. A study published earlier this year by the Rand Institute for Civil Justice reports that there has been a dramatic increase in class action activity over the last two or 3 years.

The recent testimony before the Advisory Committee on Civil Rules in the Federal Judicial Conference pointed out that some companies have faced a 300-percent to a 1,000-percent increase in the number of class actions filed against them over just these last 3 years.

One financial institution said they were involved in 65 class actions in 1996 alone. Why? Well, Federal judges are reluctant to certify classes, except in those cases where the rigid standards of Federal procedural rules are met and when fair play and judicial economy demand it.

The reluctance of Federal courts to certify class action lawsuits coincides with what has become a general willingness on the parts of some State courts to certify class action suits that have a minimal link to the State's interest.

According to the Center for Civil Justice, one Alabama State Court Judge alone certified 12 nationwide class action lawsuits in 1 year. That compares to 90 class action lawsuits certified by all of the Federal District Court judges combined.

These are opportunistic lawyers who have identified those States and particular judges where the class action device can be exploited.

Mr. COBLE. Jim, I see a red light.

Mr. MORAN. Well, I have got a lot to say here, Mr. Chairman.

Mr. CONYERS. Jim, what should we do about all of this?

Mr. MORAN. All right. What I want to do is make it easier to remove national class action lawsuits to Federal Court.

It does not make sense for a tort lawyer to be able to file class action lawsuits in States with little relation to the parties.

For example, in Cousa County in Alabama, there are 11,000 people in the county. Yet, they brought a suit there against auto manufacturers to recall all of the air bags. Now, that is going to affect people in Virginia, Michigan, Massachusetts law.

Why should that judge make that determination that affects other State parties, just because his court is more receptive to taking in that kind of a class action lawsuit?

What we are suggesting is that if a case clearly is interstate in nature, then it should be handled by Federal judges.

One of the reasons that is not going to Federal judges is because each individual plaintiff does not necessarily meet the $75,000 individual criteria. If you have got millions of potential plaintiffs, all together we are talking about potentially a billion dollar, maybe multi-billion dollar suit.

So, why should we have this arbitrary $75,000 figure that disqualifies a lot of class action suits, that are clearly national in nature, from being tried in the Federal courts?

I think this is a situation that is being exploited.

Let us have, if it is a national suit, let us have the Federal courts deal with it and let us respect what really should be State jurisdiction versus national jurisdiction.

That is what we are saying. I think we can deal with this. I think we can reduce a lot of those frivolous cases. We can make sure that we get the kinds of opinions that both serve the interest of the plaintiffs, which I know is everybody's concern, but also serve the public interest of justice and economy.

[The prepared statement of Mr. Moran follows:]

PREPARED STATEMENT OF HON. JAMES P. MORAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA

MR. CHAIRMAN: I appreciate the opportunity to appear before the Subcommittee this morning to discuss briefly the growing problem of class action lawsuits filed in our state courts.

By any objective measure, state class action suits are increasingly the weapon of choice for some in the plaintiff's bar. A study published earlier this year by the Institute for Civil Justice reports that there has been a dramatic increase in class action activity over the past two to three years.

Recent testimony before the Advisory Committee on Civil Rules of the Federal Judicial Conference highlighted this same trend. Data presented to the committee showed that some companies have faced a three hundred to one thousand percent increase in the number of class actions filed against them over the past three years. According to the report, one financial institution stated that it "was involved in 65 class actions in 1996 alone."

There are several factors that explain this trend. Federal judges are reluctant to certify classes except in those cases where the rigid standards of federal procedural rules are met, and when fair play and judicial economy demand it. This pushes some of these cases into the states.

Opportunistic lawyers have identified those states and particular judges where the class action device can be exploited. I am sure the industry witnesses here today can speak to this in more detail. For many companies, it is easier and less costly to settle a class action suit than it is to defend one in a foreign jurisdiction before a potentially biased judge and jury.

Federal jurisdictional rules which were designed to preserve federalism and protect out-of-state defendants have in some cases been turned on their head. Today in our state courts there are class action suits being heard that have all the characteristics of a "federal dispute."

In such cases, we see out-of-state defendants, multiple plaintiffs, huge sums of money at stake, and complex issues. Yet many of these cases remain in state court because of the requirements for complete diversity between all named plaintiffs and all named defendants, and minimal jurisdictional amounts.

If ever there were a case where we should err on the side of the federal court jurisdiction it is in the class action setting.

Mr. Chairman, behind the reports, studies, and legal theories associated with this issue, stand legitimate business enterprises that are being severely harmed by existing class action practice. In other cases, where businesses may be legitimately at fault, injured consumers receive little, while the plaintiffs attorneys are enriched.

Consider, for example, the case of the Tennessee lawyer who filed two class actions with the same judge over the course of a few days. Both were certified to be litigated as class action suits in a matter of hours. In neither case was the corporate defendant given a chance to defend itself or to present evidence showing why the case should not be brought as a class action. In making this point, I do not mean to single out Tennessee. This problem is occurring with some frequency in other state courts.

Or consider the case in Louisiana state court, where the plaintiffs who sued over toxic pesticide fumes each received a few thousand dollars, while the class action attorneys took home $25 million. And in another state court class action involving the Bank of Boston, the members of the plaintiff class actually lost money from their accounts as part of the settlement. As a reward for their "victory," their lawyers made $8.5 million.

There is no doubt that class action suits serve a legitimate public purpose. They prevent multiple claims arising from the same event from being tried separately, and thereby conserve judicial resources. The fights of consumers and the interests of many of our citizens have been vindicated because plaintiffs were able to band together in a class action lawsuit.

However, it is apparent to me from the examples I have cited today, as well as from conversations with business executives and lawyers from my own district, that reform is needed in this area of the law.

Although state courts are well-suited to mete out justice in truly local disputes, they should not be the arbiters of major, interstate class actions. Many state courts lack the complex litigation training, experience and resources necessary to deal with such cases. And state court judges, who are elected in most states, are more prone to bias when the defendant is a large, out of state corporation.

Mr. Chairman, we have the opportunity to fix this problem by recognizing that class actions involving plaintiffs and defendants from different states deserve federal court jurisdiction even when complete jurisdiction is lacking, and even when each defendant has not sustained the minimal threshold level of damages.

I commend the subcommittee for holding this hearing, and I stand willing to work with you and the other members here toward a solution that is fair and equitable both for defendants and those plaintiffs for whom the class action lawsuit was originally intended.

Mr. DELAHUNT. Mr. Chairman.

Mr. COBLE. The Gentleman from Massachusetts.

Mr. DELAHUNT. One quick question for my friend and colleague. You are satisfied then that the Federal system, in terms of certification and dealing with class actions is working well and working efficiently.

Mr. MORAN. Yes. I am not to change that.

Mr. DELAHUNT. So, you are happy.

Mr. MORAN. Well, you know, nothing is perfect. I do think that the Federal jurisdiction is much more reliable in terms of consistency in justice, Bill. That is where I think it should be going, particularly in national cases.

Mr. DELAHUNT. You would also recognize, however, that you know if your suggestion was adopted, that there would be an increased work load in terms of the Federal Judiciary.

Mr. MORAN. Well, you know, the public taxpayer is going to pay one way or the other. They pay to the State, the locality, or municipality.

Mr. DELAHUNT. I am not talking about dollars and cents. You are also aware of the fact that we are at 92 judicial vacancies at this point in time.

Mr. MORAN. That is a problem. I am certainly not trying to excuse that. I think those vacancies should be filled and should have been filled yesterday, not tomorrow. I will say that in terms of the total amount of effort that goes into these cases, it is a lot more efficient if you can combine these cases that are almost identical in nature.

Instead of trying them in individual States, let the Federal judicial system try them. That way, when you have citations of prior precedent, they are much more likely to be consistent.

So, that is all I am suggesting. I do not think we would be at odds. I do think we have identified a situation where there is some exploitation and abuse of the system as it now stands.

Mr. DELAHUNT. Thank you.

Mr. COBLE. Jim, you are welcome to stay. We are not running you off. I want to thank you for making me vulnerable to the other four witnesses. You ran on for 10 minutes. Now, when I blow the whistle on them at five, they will insert pins into their Coble doll tonight.

Mr. MORAN. Mr. Chairman, I thank you for your indulgence. Thank you very much.

Mr. COBLE. You are indeed welcome. Mr. Thornburgh, good to have you with us, sir.

STATEMENT OF RICHARD L. THORNBURGH, ESQ., KIRKPATRICK AND LOCKHART, LLP

Mr. THORNBURGH. Good morning, Mr. Chairman.

I thank you for the opportunity to appear before this subcommittee and share some of my concerns about those aspects of lawsuit abuse which relates to class action litigation.

I am here today because I am truly and deeply disturbed about this area of the law. It is no exaggeration to say that some members of my profession have lately perverted the class action device into their own personal litigation lottery. With all recognition to your colleague, Congressman Sensenbrenner, who may be sensitive to that term, you will inform him I meant nothing personal.

Let me elaborate. There is nothing inherently wrong with the general concept of the class action lawsuit or the theory of aggregation of claims. These suits have held an honored place in American law and in British common law for centuries. Adjudication for a class has always been feasible whenever class members have a

common legal interest that could not practically be resolved one at a time.

Adjudication makes sense in those cases in which relief granted to one class member would provide relief to all members.

Above all, such classes traditionally had no conflicting interest, making it fair to bind all members to the same judgment.

Relatively recently, however, plaintiffs' lawyers, often styling themselves consumer attorneys, have been allowed to wield class actions as judicial weapons of mass destruction.

These suits promise such devastating consequences that even the most innocent of defendants must settle or risk near total annihilation.

To add insult to these injuries, these plaintiffs' lawyers purport to hold the moral high ground. They act as if they were not mere attorneys, but private sector attorneys general. Yet, they are not bound or constrained in any way by Democratic processes.

They are free to mask their personal agendas in the guise of social policy. That the rules, and the judges who interpret them, should give plaintiffs' attorneys authority to conduct the law in such a manner is disturbing to me.

The aggregation practices of the last few decades have lacked any of the characteristics essential to class action lawsuits.

Far more corrupting to the law, these class actions are often initiated, not by the class members themselves, but by a group of class action lawyers who divide up shares of litigation as if lawsuits were investment properties.

The legal profession is rife with stories of fill-in-the-blank lawsuits. The Rand Report notes that corporate representatives and plaintiffs' attorneys alike tell of some plaintiffs' attorneys who routinely scan electronic data bases and the press to find reports of product recalls, safety warnings, regulatory actions, and other consumer complaints that can provide the basis for class actions.

This is also from the Rand Report. For $750, it is reported you can buy product litigation kits from a Washington-based group that includes testimony scripts and sample briefs.

For $10,000, you can join a secretive group of class action specialists who, as reported in *The Washington Post*, meet to target groups vulnerable to litigation.

Many plaintiffs' lawyers also hold what amounts to bidding wars for clients and often shop for friendly jurisdictions, as Congressman Moran noted, where elected judges who depend on campaign contributions are sought out to adjudicate these cases.

A final tactic, of course, is to pick jurors who harbor grievances; people susceptible to the urge to send a message. Why are class action suits proliferating? The answer is simple. Follow the money.

Last year, Attorney Lawrence Schonbrun testified before this House that in one class action lawsuit, a law firm was seeking an average hourly rate of $5,600 an hour for every hour of legal work performed.

The lead attorney was seeking to be paid at a rate of $10,450 per hour; not bad work if you can get it. Another alarming aspect of recent class action law is the utter disproportion between the huge fortunes reaped by individual trial lawyers, and the injury claimed, and remedial actions achieved on behalf of individual plaintiffs.

I will not labor this morning a collection of anecdotes, but let me just give you two examples of these incredible disparities from cyberspace.

Plaintiffs' lawyers sued a computer co-manufacturer for using reconditioned parts in new computers, even though the reconditioned part had a lower failure rate than the new ones.

The company agreed to include a notice in their manual for 3 years about the use of reconditioned parts. For this, the class action lawyers received almost $4 million in legal fees and the plaintiffs got nothing.

In another computer case, putative class members received a $13 coupon good toward the purchase of a new computer monitor, while the class action lawyers got $6 million in legal fees.

For most plaintiffs, a class action lawsuit can at best bring a minor windfall. For defendants, the outcomes can be quite different.

These judicial weapons can kill the jobs and dreams of thousands, and stunt the innovative instincts of entrepreneurs whose only mistake was to be in the path of such destruction. In one recent case, plaintiffs in a class action had to go to court in an effort to hold up their right not to sue. A routine business dispute arising over common advertising funds between Meineke Muffler and ten of its franchisees ballooned into a major class action lawsuit.

The class consisted of 2,500 current and former franchisees, even though more than half of Meineke's current franchisees say they did not want to sue their franchisor, and settled out of the lawsuit.

What resulted, however, is remarkable. A group of reluctant plaintiffs filed a brief with the United States Court of Appeals saying they were being held hostage in a lawsuit against their own interest.

They believed this lawsuit against their franchisor could ultimately hurt them and the small businesses they had worked so hard to build.

Mr. COBLE. Mr. Thornburgh, I am detecting reflections of red.

Mr. THORNBURGH. Out of the corner of my eye, I detected that as well, Mr. Chairman. I will finish under the Moran rule in jig time.

Appellate Judge Richard Posner has called the undue pressure to settle judicial blackmail. I think we can agree. Even Ralph Nader's Public Citizen, usually well-known for its love of lawsuits, is beginning to criticize the gargantuan trial lawyer fees in the celebrated second hand smoke case involving flight attendants. I think this is worthy of your attention. From the proposed $349 million settlement, $300 million would go to establish a medical research foundation on the effect of second hand smoke, $49 million would go to legal fees, but not one penny for the flight attendants who claimed the second hand smoke ruined their health!

Most of these cases occur predominantly in class actions seeking monetary damages under the Federal Rules of Civil Procedure 23(b)(3), a form of action that has existed only since 1966. The ability to aggregate claims under the multi-district litigation panel dates from about the same time.

In closing, I would remind you that these devices were created to eliminate duplicative litigation and to cut costs. Instead, we

have seen these legal devices subverted to elevate efficiency over justice, and the interest of plaintiffs' lawyers over those of nearly everyone else.

I hope that this hearing is the beginning of a process of dialogue and reform. I commend you for your interest in this difficult issue; one that is known to few of your constituents, I am sure, but has the promise to affect the livelihood of every one of them and the industries on which so many good American jobs depend.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Thornburgh follows:]

PREPARED STATEMENT OF RICHARD L. THORNBURGH, ESQ., KIRKPATRICK AND LOCKHART, LLP

Thank you for the opportunity to appear before this Subcommittee to express my concerns about lawsuit abuse, especially class-action litigation.

We all share a deep respect, bordering on reverence, for our system of civil justice. I took an oath to uphold the law and defend the Constitution as a Governor, much as you did to serve in Congress. I also took an oath to serve as the country's chief law enforcement officer as Attorney General. For those of us who are members of the bar, our deep appreciation for the law began in the classroom, pouring over *The Federalist Papers*, the writings of Madison and Jefferson, and judicial thinking of Marshall.

The private practice of law, contrary to what one might think, has only deepened my reverence for our legal system. For all its excesses, for all its inflammatory allegations and outrageous defenses, our adversarial legal system can still arrive at outcomes that are fair and just.

Just outcomes do not occur by accident. They result from the sense of *prudence* embedded within our jurisprudence.

So I am the last person who would engage in "lawyer bashing" or a casual, careless depiction of my profession. I am here today because I am truly and deeply disturbed over what some members of our profession, over the last few decades, have done to one area of the law. To put it simply, they have found ways to pervert the class-action device and other aggregation tools, transforming them into their personal litigation lottery.

I do not argue that there is something inherently wrong with the general concept of the class-action or the aggregation of claims. Such suits have held an honored place in American law, and in British common law, for centuries.

But it is only relatively recently that plaintiffs' lawyers—often calling themselves "consumer attorneys"—have been allowed to wield class-actions as judicial weapons of mass destruction. These suits promise such devastating consequences that even the most innocent of defendants must settle or risk total destruction.

To add insult to these injuries, plaintiffs' lawyers purport to hold the moral high ground. They act as if they were not mere attorneys, but private-sector attorneys general. A true attorney general, whether he or she is at the state or national level, is accountable to the public through democratic processes. And certainly no true public law enforcement officer would be allowed to personally profit from a prosecution.

Plaintiffs' lawyers, on the other hand, are not bound or constrained in any way by democratic processes. They are free to masquerade their personal agendas in the guise of social policy. That they should want to do so requires no great insight into human nature. That the rules, and the judges who interpret them, should give plaintiffs' attorneys authority to conduct the law in such a rapacious manner is, however, a disturbing development.

Of course, courts have—since the Middle Ages—entertained legal claims on behalf of groups of persons who had a common legal interest, even when some of the members of that group were not actually present. It was understood that those present represented the interests of the absentees, in both a legal and a moral sense.

Adjudication for a class has always been feasible whenever class members have a common legal interest that could not practically be resolved one at a time. Adjudication makes sense in those cases in which relief granted to one class member would provide relief to all members.

And above all, such classes traditionally had no conflicting interests, making it fair to bind all members to the same judgment.

The aggregation practices of the last few decades have often lacked any of these characteristics essential to a class-action lawsuit. Far more corrupting to the law,

these class-actions are often initiated not by the client or the class members themselves, but by a group of class-action lawyers who divide up shares of litigation, as if a lawsuit were an investment property.

The legal profession is rife with stories of "fill-in-the-blank" lawsuits, suits that are filed before the hunt for the supposedly injured parties even begins. The RAND Institute for Civil Justice reports that "both corporate representatives and plaintiffs' attorneys told of . . . plaintiffs' attorneys who routinely scan electronic databases and the press to find reports of product recalls, safety warnings, regulatory actions, and other consumer complaints that can provide the basis for class actions."

For $750 you can buy product "litigation kits" from a Washington-based group that includes testimony scripts and sample briefs. For $10,000 you can join a secretive group of class action specialists who, it was reported in *The Washington Post*, discussed in one 1995 meeting how to target makers of "carpets, compact discs, corn sweeteners . . . prescription drugs, pesticides, automobile glass, cellular phones . . ." One of these lawyers told *The Washington Post*, "we hire economists, engineers, private investigators where need be" to dig up dirt on potential defendants.

Such suits are obviously not meant to redress real injuries, but to target prosperous and vulnerable defendants.

As you might expect, class-actions of this type do not begin when a client walks into an office to see a lawyer. Nor are there attempts to even investigate fact or merit. Allegations seem to be merely copied right out news reports, fit into a cookie-cutter legal framework, and then amplified by over-heated rhetoric.

The next step is to find clients to match the alleged injury. Plaintiffs' lawyers often hold what amount to bidding wars for clients, and shop for friendly jurisdictions where elected judges depend on campaign contributions. The final trick is to pick jurors who harbor grievances, people susceptible to the urge to "send a message."

Why are these kinds of class-action suits becoming ever more common? The answer is simple: Follow the money. Last year, attorney Lawrence Schonbrun testified before this House that in one class-action lawsuit, "a law firm was seeking an average hourly rate of $5,600 per hour for every hour of legal work performed. The lead attorney was seeking to be paid at a rate of $10,450 per hour."

Not bad work, if you can get it.

Grotesque fees are only half of the equation. The most alarming aspect of recent class-action law is the utter disproportion between these vast fortunes reaped by the individual trial lawyers, and the injury claimed and remedial actions achieved on behalf of individual plaintiffs..

Let me give you just a few examples of these incredible disparities:

- Plaintiffs lawyers sued a computer manufacturer for using reconditioned parts in new computers. Never mind that the reconditioned part had a lower failure rate than the new ones. The company agreed to put a notice in their manual for three years about the use of reconditioned parts. For this, the class-action lawyers received almost $4 million dollars in fees within two months after filing the complaint.
- In another computer case, putative class members received a $13 coupon good toward the purchase of a new computer monitor, while the class-action lawyers got $6 million in fees.
- Class-action lawyers sued a water company in California for overcharging users on their water bills. The court ordered the water company to return $1.2 million, but the company only had $500,000 in assets since it was owned by the users. The water company went into bankruptcy, paying more than $3 million in attorneys' fees. The original plaintiffs got $300 each as a result of the settlement. Yet each will owe $6,000 for the cost of reorganization.

For most plaintiffs, a class-action lawsuit can at best bring a minor windfall. For defendants, the outcomes can be quite different. These judicial weapons of mass destruction can destroy thousands of innocent working people. True, a lawsuit doesn't kill in the physical sense. But it can kill the jobs and dreams of thousands whose only mistake was to be in the path of destruction.

A relatively routine business dispute arising over common advertising funds between Meinke Muffler and ten of its franchisees ballooned into a major class-action. The class consisted of 2.500 current and former franchisees, even though more than half of Meinke's current franchisees stated that they did not want to sue their franchisor and settled out of the lawsuit. What resulted is remarkable. A group of reluctant plaintiffs filed a brief with the U. S. Court of Appeals, saying that they were being held "hostage" in a lawsuit against their own interests. They believed

the lawsuit against their franchisor could ultimately hurt them and the small businesses they had worked so hard to build.

Another recent development in American class-action law is that there is often no expectation of actually taking class-action cases to trial. The apparent goal of class counsels is not to allow aggrieved clients to vindicate their claims. It is simply to amass thousands of class members to intimidate defendants into huge settlements.

Appellate Judge Richard Posner calls this undue pressure to settle "judicial blackmail." I only wish all jurists were equally skeptical, critical and independent. For example:

- In a class-action regarding domestic airline ticketing, the presiding judge allowed the parties to enter a settlement, although he would have dismissed the case if it had not been settled. The court said in its opinions, that under "the present state of the law, the novelty of the plaintiffs' claims, and the lack of any direct evidence proving plaintiffs' claims, create considerable risk to the class should the case proceed to summary judgment or trial." Nevertheless, the judge approved a settlement that awarded $14 million in attorneys' fees. The plaintiffs received coupons.
- Class-action lawyers sued a cable television company claiming that a $6 late fee was excessive. The judge concluded that the late fee was reasonable. Nonetheless, the judge also approved a settlement in which the class lawyers received $514,000 in fees.

Even Ralph Nader's Public Citizen, famous for its war on corporate America and his love for lawsuits, is criticizing what it calls "gargantuan" attorneys' fees. Public Citizen recently slammed the lead trial lawyer in the celebrated "second-hand smoke" case involving flight attendants. From the proposed $349 million settlement—$300 million would go to establish a medical research foundation on the effect of second-hand smoke, and $49 million would go to lawyers' fees. Incredibly, the deal contained not a penny for the flight attendants who claimed that working in smoky plane cabins harmed their health!

What happens when a judge cracks down on excessive fees? In the case of one prominent Houston attorney, the answer is simple: Sue the client. After winning a case over polybutylene plumbing, George Fleming was told by a Harris County District Judge that his attempt to collect fees of $108 million was excessive. Fleming—unhappy with a mere $33 million in fees and another $10 million for expenses—is suing for $60 million from his clients, most of them homeowners and small business people.

Many of these cases occur predominately in class-actions seeking monetary damages under Federal Rule of Civil Procedure 23(b)(3). These forms of action do not enjoy the long pedigree of other forms of representative litigation. In fact, the (b)(3) class has existed only since 1966. The ability to aggregate claims under the multidistrict litigation panel dates from about the same time.

It should be remembered that these devices were created to eliminate duplicative litigation and to cut costs. That is how they were *intended* to be used. Instead, we have seen these legal devices subverted to elevate efficiency over justice, and the interests of plaintiffs' lawyers over those of everyone else.

The simple truth is that these class-actions should not be certified for trial under the existing rules of civil procedure. A straightforward reading of Rule 23, governing class-actions, would result in the denial of class certification for many of the cases that are settled. A common tort requires a commonality of facts and law. That commonality is clearly lacking in many of these cases. Plaintiffs' lawyers have been allowed to turn Rule 23 into a judicial Catch 22 for defendants.

This is bad law. This is a social wrong. When there are variations in causation and the range of injuries, a common resolution is not possible—and the application of a class-action should not be acceptable.

The truth is, class-actions often arrive at the courthouse door without adverse parties, without a ripe legal dispute, and without concrete injury. Such cases should not present an Article III case or controversy, as many jurists and distinguished legal scholars argue. The absence of these essential components of a legal cause of action should necessarily deprive the court of jurisdiction, because, to be plain—there is no lawsuit.

Some in the plaintiffs' bar argue that these criteria are too formalistic. Instead, they argue, weight should be given to the argument that these class-actions serve the public interest. It is claimed that these new kinds of class-actions are the only means for detecting and punishing financial misdeeds too small to be perceived by most individuals, but that reap millions of dollars in ill-gotten gains.

True, it is conceded, plaintiffs' lawyers receive tens of millions of dollars for turning a quick settlement. True, any given class member might recover only a few dol-

lars and cents. But it is claimed that class-actions allow plaintiffs' lawyers to serve as de facto attorneys general prosecuting for the public good.

In short, we are asked to subscribe to the fatuous belief that these cases help us achieve a more just society.

Those who view class-actions as a tool for advancing the public good fail to offer convincing explanations of how it is possible to imbue a procedural rule of court with executive branch regulation or prosecutorial authority. After all, neither the Advisory Committee on Civil Rules, the U. S. Judicial Conference or the U. S. Supreme Court have such a grand and sweeping authority as the one claimed by these plaintiffs' attorneys.

Such authority does not exist and should not be asserted. In fact, the drafters of Rule 23 have gone on the record stating that there was no intent to serve any purpose other than as a court rule governing the aggregation of common claims.

Rule 23 is a device intended to improve the efficiency of adjudication—nothing more, nothing less. The deference we owe to a statutory law or even a court opinion simply is not present here. We are not dealing with a matter of substantive law or public policy. We are dealing with the failure of jurists to apply common sense and simple fairness to their own rulemaking.

Until the last few decades, a mass claim was relatively rare. In the last three decades, they have proliferated with increasing abandon—all in the name of efficiency! As the numbers of aggregated claims increase, it is becoming impossible in mass litigations to adjudicate liability, or proximate cause, or injury and damages, in a manner consistent with due process.

The sheer size of some of these classes are blunt instruments of intimidation used to force defendants to settle meritless cases. The task of reforming this area of the law will be complicated and difficult. But let us begin with the understanding that there can be no justice or fairness when the size of a case alone forces a defendant to settle.

That first, most important step of recognizing the need for reform is happening here today. This subcommittee is exposing the full range of abuses—which will surely put us on the path toward formulating meaningful, effective change in the application of the law.

I hope that this hearing is the beginning of a process of discovery and reform. I commend you for your interest in this difficult issue, one that is known to few of your constituents but has the promise to affect the livelihood of every one of them, and the industries on which so many good American jobs depend.

Thank you, Mr. Chairman.

Mr. COBLE. Judge Scirica, under the Moran-Thornburgh rule, you are recognized. Good to have you with us.

STATEMENT OF THE HONORABLE ANTHONY J. SCIRICA

Mr. SCIRICA. Thank you very much, Chairman Coble.

I am delighted to be here. I am a Circuit Judge, as the chairman has noted. While I am a member of the Advisory Committee on Civil Rules, I want to say that I express only my own views here this morning.

For the last 5 years, the Advisory Committee on Civil Rules has been studying Rule 23. We have held conferences at four different law schools and have heard testimony from countless witnesses representing all points of view.

The work of the Advisory Committee and the information it collected, including the written statements and transcripts of witnesses, were published last May in a four volume, 3,000-page document that we would be happy to share with this committee.

As the result of our inquiry, the Advisory Committee suggested several amendments to Rule 23. Most of the changes related to the decision whether or not to certify a class action under 23(b)(3).

As you know, (b)(3) permits the aggregation of individual claims with a right to opt-out of the class. For example, one proposal would have allowed the District Judge to consider the maturity of the action in deciding whether or not to certify the class.

Another would have permitted consideration of whether the probable relief to individual class members justified the costs and burdens of class litigation. Another proposal would have explicitly permitted settlement classes.

After publication, hearings and comment, the Advisory Committee and the Standing Committee on the Rules of Practice and Procedure recommended only one amendment at this time. We think it is a significant amendment.

A new subdivision (f) would create an opportunity for an interlocutory appeal from an order granting or denying class action certification.

The decision whether to permit appeal would be in the sole discretion of the Court of Appeals. It would be like a certiorari decision by the Supreme Court.

Application for appeal must be made within 10 days after entry of the order. The District Court proceedings would be stayed only if the district judge or the Court of Appeals ordered a stay.

Authority to adopt this interlocutory appeal provision was conferred by 28 U.S.C. 1292(e). Some of you may recall that an interlocutory appeal was part of the litigation landscape several years ago until the Supreme Court, in the case of *Coopers* v. *Lybrand*, decided that it was not appropriate under the rules as then-written.

The Advisory Committee, after studying this issue, concluded that the class action certification decision warranted special interlocutory appeal treatment.

A certification decision is often decisive as a practical matter. Denial of certification can toll the death knell for plaintiffs in actions that seek to vindicate large numbers of individual claims. Alternatively, granting certification can exert enormous pressure on defendants to settle.

Because of the difficulties and uncertainties that attend some of the certification decisions, the need for immediate appellate review may be greater than the need for immediate appellate review in many routine civil judgments.

Under the present appeal statutes, it is very difficult to win interlocutory review of orders granting or denying certification.

Many such orders fail to win district court certification for interlocutory appeal under 1292(b) in part because many courts take strict views of the requirements for certification. In those events, these appeals have come to the Courts of Appeals on mandamus.

When they have been granted, they appear to strain ordinary mandamus principles. The lack of ready appellate review has made it difficult to develop a body of uniformed national class action principles.

We expect that over the course of time Courts of Appeals will be able to identify and develop standards on the denial or granting of certification. I should say that this matter has now gone through the Judicial Conference.

It now rests in the Supreme Court. If the Supreme Court approves this rule change, the Congress will have it by May 1st.

If the Congress takes no action otherwise, then it will become effective on December 1st. Of course, Congress always has the option of accelerating the adoption of a rule.

Finally, I would just like to say, Mr. Chairman, that the Advisory Committee continues to study these proposed amendments that I have mentioned and others as well.

Furthermore, the Advisory Committee, together with several committees of the Judicial Conference, is participating in an informal working group that is looking into mass torts.

It became apparent during the course of our study that mass torts raised special problems in the class action context. It also became apparent that addressing the problem required separate, but related inquiries into the procedural rules, judicial management, and legislation affecting Federal jurisdiction.

These are areas where we will be focusing our attention. We hope that the Mass Torts Working Group, and its inquiry, will prove beneficial to the Congress as it considers these matters.

Thank you very much, Mr. Chairman.

[The statement Mr. Scirica follows:]

PREPARED STATEMENT OF ANTHONY J. SCIRICA, U.S. CIRCUIT JUDGE, U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT

Thank you for inviting me to appear before the subcommittee today. I am a circuit judge in the Court of Appeals for the Third Circuit. While I am a member of the Advisory Committee on Civil Rules (advisory committee) of the Judicial Conference of the United States, I wish to note that my comments here have not been approved by the Committee and express only my own views.

With the approval of The Chief Justice, the chair of the Advisory Committee on Civil Rules, Judge Paul V. Niemeyer of the Court of Appeals for the Fourth Circuit, convened a working group consisting of members of the advisory committee and representatives from the Judicial Panel on Multidistrict Litigation and several other Judicial Conference committees to study mass torts. Judge Niemeyer asked me to chair the group.

The working group held its first meeting yesterday in Washington, D.C. We have been asked to complete a report early next year. In this relatively short time, we hope to identify the principal problems and issues with mass torts and suggest possible approaches to address them. At the end of this twelve-month period, our report will be evaluated to determine what further action is appropriate.

BACKGROUND

In the last few years, the advisory committee has devoted considerable time studying proposed amendments to Rule 23 which governs class actions. During the course of our work, it became apparent that mass torts raised special problems in the class action context. It also became apparent that addressing the problem required separate but related inquiries into procedural rules, judicial management and legislation. It is in these areas that the mass torts working group will be focusing its attention. We hope that the inquiry conducted by the working group will prove beneficial to Congress as it considers these matters.

Let me briefly describe some of the steps the judiciary has already taken. In 1990, The Chief Justice appointed an Ad Hoc Committee on Asbestos Litigation to study ways to deal more effectively with asbestos mass torts litigation. In 1991, that committee submitted several recommendations—which were adopted by the Judicial Conference—to seek a national legislative scheme or, alternatively, legislation to expressly authorize collective trials of asbestos cases. As part of their recommendations, the ad hoc committee also suggested that the Advisory Committee on Civil Rules study Rule 23 to determine whether it could be amended to accommodate the demands of mass torts litigation.

CLASS ACTIONS

The advisory committee began its work in 1992 by reviewing a draft rule proposed in 1986 by the American Bar Association, which would have collapsed the three subdivisions of Civil Rule 23(b); created an opt-in class provision; authorized a court to permit or deny opting out of any class action; specifically governed notice requirements for (b)(1) and (b)(2) classes; and made other changes, many of them independently significant. In 1993, the advisory committee recommended publication of a

modified version of the ABA proposal, but then withdrew it for further consideration.

To understand the scope and depth of the problems, the advisory committee sponsored or participated in a series of major conferences at the law schools of the University of Pennsylvania, New York University, Southern Methodist University, and the University of Alabama. During these conferences, the advisory committee heard from experienced practitioners, judges, academics, and others. Representatives of the Litigation Section of the American Bar Association, the American College of Trial Lawyers, the American Trial Lawyers Association, and others attended and participated in this dialogue. The advisory committee also asked the Federal Judicial Center to study all class actions terminated in a two-year period in four large districts.

In the course of its six-year study, the advisory committee considered a wide array of procedural changes, including proposals to consolidate (b)(1), (b)(2), and (b)(3) class actions, to add opt-in and opt-out flexibility, to enhance notice, and to define the fiduciary responsibility of class representativeness and counsel. In the end, with the intent of moving deliberately, the advisory committee decided to recommend what it believed were five modest changes which were published for comment in August 1995.

During the six-month comment period, the advisory committee received hundreds of pages of written comments and testimony from some 90 witnesses at the public hearings. Comments and testimony were received from the entire spectrum of experienced users of Rule 23, including plaintiffs' class action lawyers, plaintiffs' lawyers who prefer not to use the class action device, defendants' lawyers, corporate counsel, judges, academics, journalists, public interests groups, and litigants who had been class members. The advisory committee's work and the information it collected, including all the written statements and comments and transcripts of witnesses' testimony, filled a four-volume, 3,000 page compendium of the committee's working papers published in May 1997.

Although five general changes were published for comment, the Standing Committee on Rules of Practice and Procedure decided to proceed with only the proposed amendment to Rule 23(f) at this time. New subdivision (f) would authorize a permissive interlocutory appeal, in the sole discretion of the court of appeals, from an order granting or denying a class certification. The remaining proposed changes were deferred by the committee for further reflection, or set aside in anticipation of the Supreme Court's decision in *Amchem Products, Inc.* v. *Windsor*—a Third Circuit case holding invalid a settlement of a class action involving asbestos claimants. As you know the Supreme Court affirmed the court of appeals.

The proposed amendment on interlocutory appeal is now before the Supreme Court. It will take effect on December 1, 1998, if it is approved by the Court and Congress takes no action otherwise. The amendment should lead to the development of a coherent body of law on the certification of class actions that will provide guidance to trial judges. It is a significant step, but its benefits will not be apparent for some time.

During its six-year study of class actions, the advisory committee reviewed the historical background of Rule 23. Judge Paul V. Niemeyer, the advisory committee's chair, recounted this review in his testimony on October 30, 1997, before the Subcommittee on Administrative Oversight and the Courts of the Senate's Committee on the Judiciary. At public hearings in 1996 and 1997, the advisory committee heard from witnesses who participated in the adoption of the class action rule in 1966, that mass torts was not on the minds of the Civil Rules Advisory Committee members. The amendments to Rule 23 were aimed at civil rights litigation and aggregation of other claims, not at mass torts.

John Frank, Esquire, who was a member of the advisory committee in 1966, related the background against which Rule 23(b)(3) was enacted. He stated:

> This is a world to which the litigation explosion had not yet come. The problems which became overwhelming in the 80's were not anticipated in the 60's. The Restatement (Second) of Torts and the development of products liability law was still in the offing. The basic idea of a big case with plaintiffs unified as to liability but disparate as to damages was the Grand Canyon airplane crash. A few giant other cases were discussed but, as will be shown, they were expected to be too big for the new rule.

Professor Arthur Miller, who was an adviser to the Committee at that time, recalled:

> Nothing was in the Committee's mind. . . . Nothing was going on. There were a few antitrust cases, a few securities cases. The civil rights legislation was

then putative. . . . And the rule was not thought of as having the kind of implication that it now has.

About the current far-reaching application of Rule 23, Professor Miller added:

> But you can't blame the rule, because we have had the most incredible upheaval in federal substantive law in the history of the nation between 1963 and 1983, coupled with judicially-created doctrines of ancillary and pendent jurisdiction, now codified in the supplemental jurisdiction statute.
>
> It's a new world. It's a new world that imposes on this Committee problems of enormous delicacy. And you're shooting at a moving target.

At these hearings, the advisory committee heard other instructive testimony. Lawyers representing plaintiff classes and in a few instances class members themselves, testified about the value of correcting and deterring fraudulent conduct by aggregating small claims that could not be pursued individually. Citing the concept of the "private attorney general" some characterized the rule's purpose as furthering social policy by effecting disgorgement of illegally obtained gains.

From defendants, the advisory committee heard testimony of abuse and pressure exerted through the sheer mass of aggregated claims. There was testimony that the risks attending class action litigation forced settlement in nonmeritorious cases. One witness testified that the class action device is an "extraordinarily inefficient and unwise method for penalizing the defendant." Other witnesses argued the class action rule has a substantive effect independent of the underlying claims.

As Judge Niemeyer told the Senate Committee, a paradigmatic case, from the viewpoint of both plaintiffs' and defendants' lawyers, seems to have been a class action settled in Texas. The defendants there improperly rounded insurance premium charges upward to the nearest dollar, overcharging policyholders several dollars a year. In the aggregate the charges amounted to tens of millions of dollars. Attorneys representing the plaintiffs' class settled the case, obtaining for each class member a $5.50 refund. The attorneys received in excess of $10 million in fees.

Plaintiffs' lawyers argued during hearings before the advisory committee that the Texas litigation served an important social goal in disciplining the overcharging insurance companies, in forcing disgorgement of all ill-gotten gains, and in enjoining future misconduct. The defendants' lawyers contended the case was instituted for the benefit of the attorneys, not the litigants and that the litigants were not interested in receiving $5.50 each, particularly when most had to request the refund. They argued this action should have been resolved before the Texas Insurance Commissioner who would have the power to order refunds to the insureds.

An unresolved question raised by the differing perceptions of this case and by similar testimony and commentary about other cases is whether the class action rule is intended to be solely a procedural tool to aggregate claims for judicial efficiency or whether it is also intended to serve more substantively as a social tool to enforce laws through attorneys acting *de facto* as private attorneys general.

MASS TORTS

Although there were earlier indications, mass torts as a litigation phenomenon did not take hold until the 1970's. Since then, mass torts filings have become a regular feature of American jurisprudence. As modern technology intrudes into virtually all aspects of modern living, the likelihood grows that a large number of people will sustain injuries as by-products of technological advancements. The literature is full of articles documenting the steady upward trend in mass tort filings. Toxic torts, imperfect drugs, defective products, faulty medical devices, and other products of modern technology all have been held accountable for causing harm to large numbers of people. Consumer fraud, in the nature of deceptive practices, is also part of the mass torts landscape. It is apparent that the future will generate still more mass torts litigation. In most of these cases, state law, rather than federal law provides the rules of decision.

In addition to the growing influence of modern technology, changes in the legal culture have ratcheted up the use of mass torts litigation. As more lawyers have become accustomed to mass torts, more are actively participating in mass torts litigation. In certain areas, there has been a shift from individual to collective representation, which has added strains to the effective administration of justice.

Much has been learned about mass torts since the 1991 Ad Hoc Committee on Asbestos Litigation recommended that the advisory committee study changes to the class action rule. Although some solutions have been offered, none has earned a consensus. What is clear is that mass torts are complex, overlaid with many issues including some that implicate fundamental concepts of comity and fairness.

What is also apparent is that some mass torts proposals will be controversial. For many, individual disposition is a hallmark of American jurisprudence that should not be put aside for reasons of judicial efficiency. Parties control their case in individual litigation. They decide when to settle, for how much, or when to go to trial. These "rights" might be forfeited in a collective resolution, even with the right to opt out.

Yet the courts have been asked to manage a rising tide of mass torts filings. The traditional means of dispute resolution, which rely on individual litigation, have not always been successful or efficient. Mass filings, sometimes in the thousands, threaten prompt adjudication of legitimate claims. Unreasonable delay, limited funds and disparate verdicts on liability and damages raise serious questions of fairness.

CONCLUSIONS

The mass torts working group is confronting these and other issues. The working group consists of members from Judicial Conference committees with expertise in specific areas of law. We also have the benefit of a six-year study of class actions. At this early stage, however, we intend only to try to develop a general consensus on the most serious problems mass tort litigation engenders for litigants, the courts and the public, and an analysis of the most promising resolutions of those problems.

To that end, we want to continue this dialogue with you and the other members of the subcommittee on this important matter. Thank you for the opportunity to appear before you today.

Mr. COBLE. Thank you, Judge. Mr. Frank.

STATEMENT OF JOHN P. FRANK, ESQ., LEWIS AND ROCA

Mr. FRANK. Mr. Chairman, my name is John Frank from Phoenix, Arizona. I will begin by saying thank you to the committee.

I am simply an interested professional who once taught jurisdiction and procedure, and have an ongoing professional interest in it.

I have appeared before this committee on pretty much all jurisdiction and procedural major matters you have had for the past 25 years.

The first time I was here, Representative Kastenmeyer and Representative Cohen were occupying the comparative seats. Chief Justice Traynor and I presented to you the present Federal disqualification statute.

I have been before you over the years on all of these matters over and over again and I am one who will simply express my profound respect and gratitude to this committee because it is the one place in the Federal Government to which we have been able to go on matters of great concern to the operation of our profession.

You have done a conscientious, impartial job over the years. I have expressed my appreciation for those opportunities. I did serve on the committee which originated the class action rule by appointment of Chief Justice Warren in the 1960's.

I am, I suppose, pretty much the last man standing from those days. In the first 15 or so pages of my report, I have given you an historical account of what the rule was conceived to do and what it was intended to do.

I direct your attention especially to the views of Professor Moore and of Judge Wyzanski. You will find that the class action rule, as it has operated for the last 10 years, has no resemblance on earth to what was originally contemplated as the rule and its purposes were.

I, obviously, in 5 minutes cannot do more than hope to entice you to look at the details.

Mr. COBLE. Mr. Frank, we will give you a minute or two over that. Since Mr. Moran started us off on that foot, I will not be all that rigid.

Mr. FRANK. I thank you, Mr. Chairman.

I must acknowledge to you that I dissented in 1963 from the promulgation of the rule because I believed that it would lead to fraud in its operation.

I completely concur in the views of Mr. Thornburgh because that is exactly and precisely what has happened. I was not alone.

I take the liberty of directing your attention to Appendix D of the statement I have given you, which is the letter Justice Black sent me in 1969, in which I had sent him because of an opinion of his; my original dissent from Rule 23.

The Justice said, "Dear John, Thanks for sending me your dissent to Rule 23(b)(3) concerning which I wrote in my opinion in *Synder* v. *Harris*," a case I need not detail for you now.

"I certainly agree with you that the rule is a very poor one and I am glad to know that you agreed with me at the time it was passed. Best regards. Hugo L. Black."

The views of Justice Black then remain or were my views in the 1960's, except that the condition has become considerably more acute since.

It would be, I think, not a good use of your time to give you orally the details which are in my statement, and which Mr. Thornburgh has so well-depicted, and which you know about in any case.

What I would like to raise is a somewhat different point. For this, will you indulge me in a word of personal identification. I come to these matters from the social standpoint, from the liberal side of the spectrum.

I am ordinarily more Mr. Conyer's constituent than almost anybody else who is here when it comes to casting my votes at the general elections. In short, an old new dealer. I did vote for Mr. Roosevelt.

Mr. COBLE. Mr. Frank, you have just brought smiles to Mr. Delahunt and Mr. Conyers' faces, and a frown to mine.

Mr. FRANK. Yes, and I appreciate that. What I wish to call to your attention is what I think is a serious problem here. That the class action rule, wholly without regard to what its original purpose was, has become something of a device for social administration, which should never have been the product of the rules at all.

These are matters which should be handled by the Congress and by the administrative agencies rather than by attempted efforts to govern various parts of the economy by lawsuits which give more to the counsel than to the parties in any case; the Lawyer's Relief Act, which is what the rule has become, than they do to those who should benefit from them.

I particularly adopt the chairman of the Rules Committee at the present time, Judge Paul Niemeyer, chairman of the committee from the Fourth Circuit Court of Appeals. I have quoted his statement on page 15 of my statement.

He says, "I believe that Rule 23 was never intended to be a tool to enhance enforcement of substantive claims. Such legitimization should, in my judgment, be effected by Congress, and Congress

might well conclude," and that is you, Gentlemen, "that it is too anarchial to authorize private attorneys to self-appoint themselves as enforcers of law without adequate accountability to the lawmakers or to the public."

Now, I have taken the liberty of giving you certain specific recommendations. I would like, if I may, to run through those and then terminate. May I ask your indulgence, Mr. Chairman?

Number one, the Supreme Court, let us face it, ran a snowplow through a good deal of what had been happening on class actions in the Amchem opinion.

I respectfully submit that, that opinion should be codified whether in the rules or by statute in some clear cut way. So that if, as Judge Scirica suggests there be review, there would be standards for review.

The Supreme Court has made an immense improvement with its opinion. I have detailed precisely that in this statement.

Number two, I completely subscribe to the views which have been expressed by others here, that class actions in State courts, where the industry involves interstate commerce, should be removable to the Federal court, regardless of the otherwise diversity limitations as a major recommendation; particularly in cases where potential recovery to individuals is very small.

The class should exist only on an opt-in basis permitting a res judicata to follow only for those who opt-in. We should eliminate the system of opt-out. I have explained the opt-out history in this statement. You can look to see that it has gone totally askew in its operation.

Next, the decision of the Supreme Court, which permits settlement and fees to be decided in the same case at the same time, was a reversal of the position of the third circuit, which required that settlement and fees be separate. I strongly recommend to you, as a minor improvement, that you change that system and put it back to the third circuit rule. Allowing settlement and fees to be settled together, to put it bluntly, permits the defendant to bribe plaintiffs' counsel by giving him a large settlement figure for fees without paying any attention to what the recovery is.

In short, a sizeable part of the misfortunes that come from the system is permitting the fees and settlement to be determined together. The third circuit has wisely said that they should be separated.

I strongly recommend to you, as simply a minor but precise improvement, that you go back to the third circuit rule. The Supreme Court, I think, did not perceive the havoc it was creating by putting those things together.

Finally, I submit that fluid recoveries, as they are called, that is to say, recoveries which give little or nothing to the class other than, let us say, a certificate or a six-week's reduction in the price of milk, or some other thing should be eliminated.

If people have a lawsuit and should recover, they should get damages. This should not become a social regulatory device. Those matters, frankly, should be left to your hands.

Thank you very much, Mr. Chairman, for the opportunity of being here, and even more thanks for the willingness of this com-

mittee to face what has become a serious social and legal problem in the United States. Thank you.

[The prepared statement of Mr. Frank follows:]

PREPARED STATEMENT OF JOHN P. FRANK, ESQ., LEWIS AND ROCA

SUMMARY

Mr. Frank was a member of the Civil Rules Committee in the 1960s, from which present Rule 23 originated. He dissented from the promulgation of the rule at that time on the ground that its (b)(3) would lead to fraud. In his statement, he discusses, first, the background of the rule and, second, how it has played out in practice.

Mr. Frank follows the view of present Civil Rules Committee Chairman, Judge Paul V. Niemeyer of the Fourth Circuit, as expressed to the parallel Senate committee, that (b)(3) as applied has gone far beyond the scope of the proper rule-making power and is a direct intrusion on Congressional authority. He concludes that the rule has unwisely allowed private attorneys to self-appoint themselves as enforcers of laws without adequate accountability to the lawmakers of the public. His specific recommendations are:

1. The Supreme Court decision in *Amchem* should be codified; the statement contains specific recommendations.
2. Class actions in state courts, where an industry and interstate commerce is involved, should be removable through the federal courts, regardless of whether there is total diversity.
3. Particularly in cases in which potential recovery to individuals is very small, the class should exist only an opt-in basis instead of permitting res judicata to follow from a failure to "opt-out."
4. The decision of the United States Supreme Court permitting settlements and fees to be determined at the same time gives an incentive to bribe plaintiffs' counsel with a large fee without regard to the benefit to the class. The earlier Third Circuit rule, requiring that the settlement procedure and the fee procedure be separate, should be restored by statute.
5. Fluid recoveries, i.e. recoveries which give little or nothing to actual members of the class, but purport to bestow some benefit on the public, should be abolished.

STATEMENT

My name is John P. Frank and I am the senior partner of the law firm of Lewis and Roca, Phoenix, Arizona. I served as a member of the Committee on Civil Procedure by appointment of Chief Justice Warren, as that committee existed in the 1960s when Rule 23 was created. Since that time, I have been involved as a witness or otherwise in a great number of matters relating to the jurisdiction of the federal courts and their procedure. I have been an emeritus but participating member of the Civil Procedure Committee for a number of years, including the years in which Rule 23 has been reexamined. I have repeatedly appeared before this Subcommittee and its Senate equivalent on one or another matters of procedure or jurisdiction. I was chairman for many years of the Arizona state procedure committee, which is essentially identical with the federal system, and have taught jurisdiction and procedure variously at Yale University, the University of Arizona, Arizona State University, and the University of Washington; and I have lectured throughout the country on these topics. My WHO WHO'S and MARTINDALE-HUBBELL squibs are attached to this statement as Exhibit A.

I have had kindly recognition for involvement in work of this kind, most recently the receipt of the Lewis F. Powell, Jr. Award of the American Inns of Court Foundation in a ceremony performed at the Supreme Court. Others who have preceded me in that award include Justice Powell himself, Justice Brennan, and Judge John Minor Wisdom of the Fifth Circuit Court of Appeals.

I. Origin of Rule 23.

Rule 23, on which the basic committee work was done in 1962 and 1963 and which was promulgated in 1966, must be seen as part of both its professional and its social times. The social setting had a most direct bearing on this rule. Rule 23 was in work in direct parallel to the Civil Rights Act of 1964 and the race relations echo of that decade was always in the committee room. If there was single, undoubted goal of the committee, the energizing force which motivated the whole rule,

it was the firm determination to create a class action system which could deal with civil rights and, explicitly, segregation. The one part of the rule which was never doubted was (b)(2) and without its high utility, in the spirit of the times, we might well have had no rule at all.

The other factor is that 1964 was also the apogee of the Great Society. President Johnson was elected with the most overwhelming vote ever, as of that time, achieved by anyone. A spirit of them versus us, of exploiters who must not exploit the whole population, of a fairly simplistic good guy—bad guy outlook on the world, had its consequences.

One other element of the time must be identified: This was a world to which the litigation explosion had not yet come. The problems which became overwhelming in the eighties were not anticipated in the sixties. The Restatement (Second) of Torts and the development of products liability law was still in the offing. The basic idea of a big case with plaintiffs unified as to liability but disparate as to damages was the Grand Canyon airplane crash. A few giant other cases were discussed but, as will be shown, they were expected to be too big for the new rule.

Put at its simplest, what new Rule 23 did, first, was expand the true class action somewhat, (b)(1); second, make sure that suits against segregation, as well as other civil rights cases, would be within the class action rule and would be binding as to all members of the class liberally conceived, (b)(2); and third, the one time spurious class action which has been restricted to actual parties was turned into a binding res judicata procedure which could cover a universe as large as notice could reach. It is, I believe, true that (b)(3) was the most radical bit of rulemaking since the original rules created one cause of action and abolished key distinctions between law and equity. The committee repeatedly spoke of it as a "crowning accomplishment."

It was perfectly apparent to the rules-makers of the time that they were doing big things. The critical meeting was October 31 and November 2, 1963, and the most sharply disputed question was whether to have Rule (b)(3) at all.

There were two levels of concern over (b)(3), apart from details. Remember, the possibility of group securities actions, of RICO and of products liability were still in the future. The sharp practical concern was that major defendants charged with tort liability could readily rig what I will unkindly call a patsy class, arranged to have it sue, have the class take a dive, and thus let the defendants avoid responsibility. It was perceived from the beginning that the class action had the potential of turning the courts into merchants of res judicata, selling that valuable asset at a manipulated price. That was the practical problem and it was more than hinted at from time to time. Remember that this was the era of the Great Society, and "big business" has a very limited stock of trust.

So much for the underlying policy resistance. The legal form which this resistance took was that it was morally and constitutionally wrong to deprive people of their causes of action without their consent. Mind you, this is not long after such cases as *Sipuel* v. *Oklahoma* or other of the great civil rights cases which had heavily stressed that individual legal rights were personal, not fungible. There was an intense sensitivity to the fact that people should not be swept into a basket; that their rights were independent and personal to them.

Had this problem of individual rights not been solved in a fashion which satisfied that committee, I think there never would have been a (b)(3). There was great concern that in mass torts perhaps there should be no class actions at all. Professor J.W. Moore gave the illustration of the Ringling Bros. mass tort, the fire in the tent at Hartford. He said that any compulsory class action "goes against my grain of the right of the litigant to run his own lawsuit"; and he repeated a concern I had expressed earlier that "the Pennsylvania Railroad, or some other alleged tort feasor" might take "the initiative to force a concourse of plaintiffs in a particular jurisdiction. I can't think of anything nicer for the general counsel of the Pennsylvania Railroad in the Perth Amboy situation, than your class suit rule."

It was at that moment that committee member Judge Charles Wyzanski had his flash of genius. He responded to Professor Moore, "Would you be satisfied, Professor Moore, if the class could *never* include anybody who specifically protests within a given period?" Professor Moore responded, "That would be helpful" and the principal opponent of (b)(3) added, "If that were done, my problem would evaporate."

Thus, the opt-out concept was born and quickly adopted. Again, it must be perceived that this was not the conception of the "opt-out" of today because the really large class action had not yet been conceived of. Judge Wyzanski was thinking of relatively small classes, and he said of the individual claimant, "If he cares enough to conduct his own litigation," he should "be allowed to do it. He must affirmatively care." Again, it was here assumed that opt-out was an actual conscious choice of a person who had a meaningful alternative to bring his own action. It assumed that the interest of the individual was large enough so that the option of bringing one's

own action was a meaningful option. The concept of thousands of notices going ceremonially to persons with such small interests that they could not conceivably bring their own action was still in the future. The committee thought that it was making a major policy decision and not that as a practical matter it was simply going to either subsidize or burden future branches of the United States postal system with superfluous mail.

I make this a little more innocent than it was. Professor Kaplan raised the possibility of very large numbers of claims. A couple of other examples were given. But Judge Wyzanski was firm that all those people, even in a giant case, would have to have notice:

> I think you also have to make a finding that the form of notice to be used would in all probability reach all persons in the proposed class. And I think it quite clear that in [an enormous case involving thousands] you could not make any such finding. I don't think that case is a class action except for those people who can be reached.

It is a great tribute to Judge Wyzanski's foresight that the Supreme Court has since held that notice and an opportunity to opt out is constitutionally required in class money claim cases. *Phillips Petrol. Co.* v. *Shutts*, 472 U.S. 797, 812 (1985).

It is with that understanding that the rule was adopted and it was with that understanding that the notes contain the famous restriction that this rule would rarely, if ever, be used in mass tort cases. As a member of the committee, I dissented from the (b)(3) portion of the rule on the grounds that the classes would be too easy to rig and that if a pharmaceutical drug case were filed in state A, a user in state B should not be compelled to hire a lawyer to determine whether or not he should opt out.

II. Expansion.

The number of class actions following immediately upon the adoption of the rule was small. That is no longer the case. The number now runs into the low thousands. As the cases become bigger, the number of cases closed declines, so that there are an ever-larger backlog. We are now in the era of the billion dollar or several billion dollar aggregate actions; some big ones are Agent Orange, Dalkon Shield, and DES. Some of these big cases have been class actions, while others have been pulled together under the multi-district panel system. The common areas are torts, antitrust cases, securities cases, and RICO or consumer fraud cases.

III. Problems.

A. The Fix.[2]

Quite clearly the fear of some, of whom this writer was definitely one, was that the rule would invite trouble by giving prospective defendants an opportunity to rig classes which might be cheaply bought out. The 1963 spectre has not, in fact, arisen to haunt the system. This phase of the federal district courts becoming merchants in the sale of res judicata has not occurred.

But its cousin has. Potential defendants have not had to create phony cases. The "take a dive" plaintiff class has instead been empowered by the attorney who purports to represent the class—the attorney for the fair and adequate representative according to the rule—who is prepared, in effect, to take a bribe in which he gets a lot and the members of the class get very little. Such arrangements are also called "sweetheart settlements with defendants, trading a portion of the compensation due victims for a premium on, or merely the certainty of, the fee recovery." D. Rosenberg, *Class Actions for Mass Torts*, 62 Ind. L.J. 561, 583 (1987).

For want of statistical evidence, one must become anecdotal, and I report from anecdote that this phenomenon exists. As § 30–42 of the Manual for Complex Litigation Second (sometimes called by the judges the Complex Manual for Litigation) recognizes, "counsel for the parties are the main source of information concerning the settlement." Of course the judge should review the settlement and of course there should be opportunity for protest, but with the backlog of thousands of class actions pending, with presumably all of them before very busy judges, and with judges bringing uneven levels of ability to the task—not all of them are a Judge Pointer or Judge Weinstein or Judge Higginbotham—settlements can be perfunctorily swept through.

A recent illustration of an extraordinarily meticulous fee study is that of Judge William Browning in a $600 million matter, largely though not entirely affirmed after close thought in *Washington Pub. Power* v. *City of Seattle*, 1994 W.L. 90327

[2] In this section, I am reporting on the commercial and tort cases, not the "good cause" cases, such as the environmental actions.

at 9 (9th Cir. Mar. 23, 1994). This was a seven-and-a-half-year case. It took a law clerk one year, full time, to analyze the fee claims and the judge over three weeks to utilize the data and reach his result. As is observed in a very substantial Stanford Law Review article, judicial review of the records in a big case "seems a positively breathtaking waste of an article III judge's time," and this review usually results in "a few generalities about the uncertainty of recovery" and a contingency multiplier. J. Alexander, *Do the Merits Matter?*, 41 Stan. L. Rev. 497, 578-79 (1991). As has been said in a very constructive analysis, "Ultimately, the most persuasive account of why class actions frequently produce unsatisfactory results is the hypothesis that such actions are uniquely vulnerable to collusive settlements that benefit plaintiffs' attorneys rather than their clients." J. Coffee, *Plaintiffs' Attorneys in Class Actions*, 86 Col. L. Rev. 669, 677 (1986).

This does not, by any means, always happen. A splendid example is of a large securities fraud case pending in the district court in Louisiana. A settlement was negotiated in which the security holders would receive 1.7 cents return on each dollar invested, minus 25 percent for legal fees, essentially a penny on the dollar. The net return to the investors, in short, was slightly over one percent and counsel fees were proposed to be $7 million.

This one was gross enough to raise a howl and a national television program highlighted it. This led to a protest. The judge did take steps to reject the proposal and a later, different and fairer settlement was worked out. But in most settlements, there is no television coverage and the sense of scandal is not large enough, nor the potential awards great enough, to engender an effective protest.

As this thought has been politely put, "Because the economic interests of the attorney and the class may conflict, the attorney may negotiate settlement terms that do not reflect the interests of the absentee class." Note, *Abuse in Plaintiff Class Action Settlements*, 84 Mich. L. Rev. 308 (1985). Without any venality, but simply as a matter of business judgment, as Judge Friendly has observed, the attorney may have an advantage in taking a smaller settlement bearing a higher ratio to the cost of work than a larger settlement obtained after extensive discovery, trial and appeal. *Saylor* v. *Lindsley*, 456 F.2d 896, 900 (2d Cir. 1972).

The hazard of this conduct was greatly increased by the United States Supreme Court decision in the matter of *Jeff D.* v. *Evans*, 475 U.S. 717 (1986). It had previously been the rule in some circuits—the lead case was from the Third Circuit, *Pandrini* v. *National Tea Co.* 557 F.2d 1015, 1021 (3d Cir. 1977)—that the settlement on the merits and the determination of legal fees must be truly separate episodes so that the merits would be determined at one time and the legal fees at another and later time. This reduced the bribery potential. But the Supreme Court in *Jeff D.* held that both of these matters could come on at once, so that the defendant could settle with the class and settle with the lawyer simultaneously.

I strongly recommend that legislation reverse *Jeff D.*

This has not improved the returns to the classes. As Professor Kane has observed with respect to settlement proposals which "explicitly provide for large attorney's fees, . . . the court cannot rely on opposing counsel to assure a full adversary presentation of the attorneys' fee application because, having reached a settlement, the class opponents have no interest in how the fee issue is resolved." M.K. Kane, *Of Carrots and Sticks*, 66 Tex. L. Rev. 385, 398 (1987). Moreover, as the Ninth Circuit has observed, "the relationship between plaintiffs and their attorneys turns adversarial at the fee-setting stage." *Washington Pub. Power* v. *City of Seattle, supra.* For another discussion of "the pressures on class lawyers to settle and obtain fees rather than maximize the benefits to the class," *see* L. Grosberg, *Class Actions and Client-Centered Decision Making*, 40 Syracuse L. Rev. 709, 776 (1989). Let me be very explicit. Nothing in this aspect of the fee problem makes the defense attorney look any better than the plaintiff's attorney.

B. Fees.

We have no clear-cut analysis of the extent to which Rule 23 deserves the title occasionally given to it in casual talk among lawyers as the Lawyers Relief Act. The disproportion of the returns to members of the class and the returns to the lawyers who represent them is often grotesque. In many cases, the individual members of the class are entitled to receive at most a dollar or two, while the attorney who secured this benefaction for them can retire on his share of this victory. This Relief Act aspect of course cuts in both directions because the defense bar must also be paid a sizeable sum for its efforts to keep the recovery down. As is developed elsewhere, "the paramount motivation for such litigation [is] counsel's desire to generate substantial fees." Note, *Attorneys' Fees in Class Action Shareholder Derivative Suits*, 9 Del. J. Corp. L. 671 (1984), citing *Zeffiro* v. *First Pennsylvania Bank*, 581 F. Supp. 811, 813 (E.D. Pa. 1983).

The result by the 1980s and the present time, by way of historical development, has been oft times to create a giant churn. The plaintiffs' lawyers are busy, the defendants' lawyers are busy, the courts are busy, and the cream that should rise to the top from all of this churning is frequently only a drop or two for those whom Rule 23 was designed to benefit. For a strenuous attack on counsel fees, *see* J. Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497 (1991), giving one illustration of a thousand dollar an hour fee. The article also illustrates the use of special masters as judges try to take control of the detailed analysis of some of these claims.

The common argument in favor of allowing class actions to proceed with pittance returns to the beneficiaries is that this serves as a social regulatory mechanism and helps to avoid future abuses of the general public. Collateral to this is the argument that at least some of these cases are brought by organizations generally well regarded for good works in behalf of consumers or other beneficiaries and that the fees helped to sustain such organizations. However, there has never been a meditated analysis as to whether this form of social regulation for consumers or the environment is better handled by government agencies or by the courts, nor whether the burden on the court system over-balances the value of this indirect form of social legislation and administration.

A different solution to the minuscule recovery and the large fee is the concept of "fluid recovery." The development of this device, largely in the past fifteen years, is set out in J. Solovy and others, *Class Action Controversies* at 140–42 (1994). For example, when members of the class would get only two dollars a piece, the only winners are likely to be the attorney and, oddly enough, the defendant because nobody applies for these small amounts and the defendant gets to keep the money. Under the developing notion of fluid recovery, there are other forms of charge without any effort to get anything to the individual plaintiffs. Illustrations are price rollbacks, coupons, and other devices; for discussion, *see* G. Hillebrand and D. Torrence, *Claims Procedure in Large Consumer Class Actions*, 28 Santa Clara L. Rev. 747 (1988).

I attach as Exhibit B a summary of what appear to be abuses, as well as a couple of recent stories from *The National Law Journal* and *The Wall Street Journal* involving the problem of token for the class member and great wealth for the representative.

C. The Class Representation.

1. Who is the representative?

The rule assumed that there would be an honest to God plaintiff or plaintiffs as true representatives of the class. That has become a fiction; the class representative "has been reduced to a little more than an admission ticket to the courthouse and one anecdotal example of the class claim. Class counsel does all major planning and makes the critical litigation decisions." J. Burns, *Decorative Figureheads: Eliminating Class Representatives in Class Actions*, 42 Hastings L.J. 165, 166 (1990).

The only close analysis in the literature strongly suggesting that no plaintiff is representing the class is the Alexander study in the Stanford Law Review, supra, analyzing nine settlements in securities cases. The stakes in those cases range from $19 million to $95 million. The percentage settlement in seven of those cases range from 20 percent of the stake to 27 percent and four of them are within a two-point spread. The merits of those claims had nothing whatsoever to do with the settlements; the merits could not be so interchangeable. These are cases in which officers and directors are named as defendants and strongly suggest that settlements are made with corporations to get the insiders off the hook.

2. The race for the gold.

The most visibly distasteful aspect of class actions is the race by attorneys to grab the first class claims and thus get to be lead counsel or at least on the steering committee. The ashes from the great fire will not be cold and the corpses barely at the mortuary before someone will have filed a class action; having found one person, dazed but alive, or one widow, the attorney quickly files the action. There is no actual representation of a class at all.

From there on out, the case is churned to warrant more fees. There are cases where the defendant would settle immediately, but is not given the chance.

The development described here is anecdotal and not statistical, but the anecdotes come on high authority. To write this paragraph I have consulted four past presidents of the American Trial Lawyers Association, the number one group of plaintiffs' lawyers. They are unanimous that this practice exists and that it is disgusting; they refer to these speed artists as "The Parachutists." This historical development, they believe, brings shame to the Bar and particularly to their great division of it.

IV. Illustration of Claimed Successes.

Very responsible groups do not share my views on (b)(F). One of those groups is the Alliance for Justice, of which I am a director and for which I have enormous respect. I, therefore, insert here as a balance to my own views—though I am not myself persuaded—the views of the Alliance for Justice on this point, Exhibit C.

V. Amchem.

Judge Edward Becker of the Third Circuit Court of Appeals, whose opinion is largely affirmed in the important opinion by Justice Ginsburg in *Amchem* at the last session of the Supreme Court, has put a needed a major rein on the abuses of settlement classes. The Ginsburg opinion reminds us that Rule 23 sets its own limitations and is to be followed; she puts a sharp check on the endless expansion of the rule by judicial application. She also lays down important restrictions on classes generally and on settlement classes in particular.

VI. Recommendations.

The Congress must decide to what extent it wishes to reconstruct Rule 23 by legislation and to what extent it wishes to leave this to the Rules Committee structure. I personally believe that the rule has become so abusive that running reform on double track is a good idea, and some portions of what is necessary would in any case require congressional action. Specifically:

A. The Approach.

I approach this topic from the liberal standpoint, and have no reluctance about social engineering through law. But the rules structure was not created to make the rules committee into social engineers. If social changes are desired, the Congress and the Executive department through its agencies should take the responsibility of policy and enforcement. I am wholly persuaded of the view expressed by Judge Paul Niemeyer, the present Chairman of the Civil Rules Committee of the Judicial Conference in his response to the parallel Senate committee on this subject. He was asked whether he thought it desirable for Rule 23 to be used as a social tool to enforce laws through attorneys essentially acting as private attorneys generally:

> I believe that Rule 23 was never intended to be a tool to enhance enforcement of substantive claims. Rather, I believe, it was designed as a procedural device to facilitate the aggregation of claims for judicial efficiency. Others, however, believe that while judicial efficiency may have been the original intent of Rule 23, the rule has transformed by use into a mechanism to enhance substantive enforcement with the result that it actually supplements or even displaces government regulation. While there is plenty of evidence to support this observation, if it were to be legitimized as a purpose for Rule 23, such legitimization should, in my judgment, be effected by Congress, and Congress might well conclude that it is too anarchial to authorize private attorneys to self-appoint themselves as enforcers of laws without adequate accountability to the lawmakers or to the public.

Response to Senator Grassley, December 16, 1997, Question No. 2.

B. Removal.

The Judicial Code should be amended to permit removal of class actions from state courts whenever an industry involved in interstate commerce is involved. Since John Marshall's time, it has been the interpretation of the diversity statute that there must be total diversity in order for a case not involving a federal question to be in the federal courts. In the famous case of *Strawbridge* v. *Curtis*, the Chief Justice made clear that this was a matter of statutory interpretation and not constitutional necessity. While most courts can handle class actions perfectly well, we cannot blink the fact that there have been some gross abuses where an obscure state court gives res judicata effect to a settlement which binds the entire United States.

C. Codify Amchem.

In my view, settlement classes should be abolished; but if we are to have them, then they should, as the Supreme Court has made very, very clear, be held to the same standards as would be a full-scale adversary class action proceeding. I would codify the Amchem case to provide that in considering a proposed settlement class, § 23(b)(3)(D) is inapplicable; heightened scrutiny is required as to 23(a)(4) and the other provisions of Rule 23 apply equally to settlement class actions, as well as to all other class actions. The elimination of (3)(D) means that the court will not need to consider "the difficulties likely to be encountered in the management of a class

action" because, as Justice Ginsburg sensibly said, if the matter is going to be settled, there isn't going to be any management anyway.

The provision for heightened scrutiny of the (a)(4) element is the insistence that the court look with great care at whether "the representative parties will fairly and adequately protect the interests of the class." *Amchem* makes this of special importance because, to put it bluntly, it is in the settlements that the lawyer may sell out the class for the sake of his pocketbook. In all other respects, the settlement class should have to meet the requirements of all other classes.

D. The Opt-Out.

In matters in which it appears that the recovery of individual members of the class, as distinguished from their counsel, is likely to be small, the proceedings should go forward as a class only if the proposed members affirmatively, after notice, express a desire to be included in the action. "Opt-in" should be substituted for "opt-out." The object is to take the romance out of class actions in which putative class members have no wish to be involved. It will take the burden off the court by determining this matter early instead of after extended procedures.

E. Settlement and Fees.

The earlier Third Circuit rule should be made national if there is to be settlement; the fees should be independently considered.

F. "Fluid Recovery."

"Fluid recovery" (that is nothing to the class and some general bonanza to some public interest) should never be allowed. I refer to such devices as an order which gives nothing to the class but which provides that the defendant dairies should lower the price of milk by two cents a quart for a given period of time. Nothing in the Constitution, the Code, or the rules makes the courts proxies for the appropriation committees of Congress or makes them specialized tax collectors for public purposes.

VII. Conclusion.

I conclude by attaching as Exhibit D a letter received by me from Justice Hugo L. Black of the United States Supreme Court in 1969. Rule 23(b)(3) was a mistake from the beginning and I take some comfort from the fact that so distinguished a person was of the same point of view.

EXHIBIT A

LEWIS AND ROCA LAWYERS

Areas of Practice:

Mr. Frank is a partner in the firm's Special Litigation Group. His extensive experience includes the areas of appeals, civil litigation and antitrust. Prior to joining the firm in 1954, Mr. Frank served as Law Clerk to Mr. Justice Hugo L. Black during the October 1942 term of the United States Supreme Court. He also was Assistant Professor of Law at Indiana University from 1946-49 and Associate Professor of Law at Yale University from 1949-54 and during that time was associated with the Antitrust Division of the United States Department of Justice.

In 1991, Mr. Frank was named for the third time to the *National Law Journal's* list of the "100 Most Influential Lawyers in America." He is also listed in the current (1996-97) edition of *Best Lawyers in America*.

Mr. Frank has been involved in more than 500 appeals in his years with the firm. These include many cases at the Arizona Court of Appeals, the Arizona Supreme Court, the Ninth Circuit Court of Appeals, other federal circuits, and the United States Supreme Court. A recent appeal concerned the premium required to be paid by physicians at the University of Arizona Medical School for malpractice insurance and resulted in client savings of over seven million dollars. He continues to be active in state trial courts and federal district courts, where he has represented the motion picture industry in antitrust litigation, has recently represented a newspaper on antitrust and contract issues, and is currently representing an air tanker contractor in federal district court litigation on an issue of whether certain planes were properly acquired.

Mr. Frank is frequently called upon for opinions, as for example, the water rights of an Arizona Indian tribe. His professional work is entirely occupied with litigation in a variety of forums, in legal matters either in anticipation of litigation or seeking to avoid litigation.

Professional Activities:

Mr. Frank is a member of the Maricopa County Bar Association, the State Bar of Arizona and the American Judicature Society. He is on the Council of the American Law Institute and is a Fellow of the American Bar Foundation.

From 1960-70, Mr. Frank was a member of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States and continues to meet regularly with it; a member of the Arizona Salary Commission from 1970-82; and a member of the Arizona Appellate Court Nominating Committee from 1972-84 and chairman of the nominating commission for the U.S. Court of Appeals, 9th Circuit (Southern) from 1977-1980.

Mr. Frank serves as general counsel to the Arizona Democratic Party. He is a Director for the Alliance for Justice (headquartered in Washington, D.C.) and a member of the Senior Advisory Board for the Ninth Circuit of Appeals. A former board member of the Phoenix Art Museum, he is very active in pro bono litigation.

JOHN P. FRANK, born Appleton, Wisconsin, 1917; admitted to bar, 1940, Wisconsin; 1954, Arizona; 1966, District of Columbia. *Education:* University of Wisconsin (B.A., 1938; M.A., 1940; LL.B., 1940); Yale University (J.S.D., 1947). Awarded LL.D., by Lawrence University, 1981. Order of the Coif. Recipient, Harley Award, 1984. Author and Editor: "Cases and Materials on Constitutional Law," Callaghan & Co.; "Cases on the Constitution," McGraw-Hill; "Mr. Justice Black," Alfred A. Knopf, Inc.; "Marble Palace, The Supreme Court in American Life," Alfred A. Knopf, Inc.; "Lincoln as a Lawyer," University of Illinois Press; "Justice Daniel Dissenting," Harvard University Press; "The Warren Court," The MacMillan Co.; "American Law: The Case for Radical Reform," The MacMillan Co.; "Clement Haynsworth, the Senate, and the Supreme Court," University Press of Virginia. Assistant Professor of Law, Indiana University, 1946-1949; Associate Professor of Law, Yale University, 1949-1954. Law Clerk to Mr. Justice Hugo L. Black, October, 1942, term. Member, Committee on Rules of Practice and Procedure of the Judicial Conference of U.S., 1959-1970. Member: Arizona Salary Commission, 1970-1982; Arizona Appellate Court Nominating Committee, 1972-1984, Chairman, Merit Selection Committee, U.S. 9th Circuit, South, 1977-1979. *Member:* American Law Institute (Member, Council, 1973—); American Judicature Society. Fellow, American Bar Foundation. *Appeals, Civil Litigation, Antitrust.*

FRANK, JOHN PAUL, lawyer, author; b. Appleton, Wis., Nov. 10, 1917; s. Julius Paul and Beatrice (Ullman) F.; m. Lorraine Weiss, May 11, 1944; children—John Peter, Gretchen, Karen, Andrew, Nancy. B.A., U. Wis., 1938; M.A., LL.B., 1940; J.S.D., Yale U., 1946; LL.D., Lawrence U., 1981. Bar: Wis. 1940, D.C. 1966, Ariz. 1954, U.S. Supreme Ct. 1945. Law clk. U.S. Supreme Ct. Justice Hugo L. Black, 1942; asst. to sec. interior, 1943, to atty. gen., 1944-45; asst. prof. law Ind. U., 1946-49; assoc. prof. law Yale U., 1949-54; vis. lectr. U. Wash., 1966, U. Ariz., 1967, Ariz. State U., 1969, 72; mem. firm Covington & Burling, Washington, 1947, Arnold & Porter, Washington, 1948, 53, Lewis and Roca, Phoenix, 1954—; mem. adv. com. civil procedure Jud. Conf. U.S., 1960-70; mem. exec. com. Adv. Com. on Appellate Justice, 1970-73. Democratic precinct committeeman, 1956; counsel Ariz. Dem. Com., 1962-65, 78-83. Mem. ABA, Am. Law Inst. (council), Am. Bar Found., Maricopa County Bar Assn. Clubs: Arizona, University (Phoenix). Author: Mr. Justice Black, 1949; Cases on Constitutional Law, 1950; Cases on the Constitution, 1951; My Son's Story, 1952; Marble Palace, 1958; Lincoln as a Lawyer, 1961; Justice Daniel Dissenting, 1964; The Warren Court, 1964; American Law: The Case for Radical Reform, 1969; contbr. articles to profl. jours. Federal civil litigation, State civil litigation. Home: 5829 E Arcadia Ln Phoenix AZ 85018 Office: 100 W Washington St Phoenix AZ 85003 85004-4429 40 N. Central

EXHIBIT B

1. *Kamilewicz v. Bank of Boston.* Bank of Boston agreed to deposit $8.76 in each class member's bank account and then deduct up to $100 from each account for counsel fees.

2. Someone has brought a class action against New York Life Insurance Company. A settlement has been reached. I happen to be a policyholder and, hence, am in the class. What I get for my "victory" is that I can, if I wish, borrow some money from New York Life to pay my premium, and I can buy some more insurance if I care to at a favorable price. I don't need the money and don't want the insurance, so this doesn't do me a great deal of good. Counsel gets $22 million.

3. *Barros and Naja v. GE Capital Mortgage Services, Inc.* The class each gets $2.20 and counsel gets $200,000.

4. See attached documentation of an eight cents victory.

5. *Rosenfeld and Hart v. Bear Stearns.* Plaintiffs get nothing; counsel gets $500,000.

6. *Strommer v. GE Capital Mortgage Services, Inc.* Plaintiffs receive "less than $1 and no more than $2." Counsel fees "not to exceed $500,000."

7. In a *Prudential* case report in the National Law Journal, December 4, 1995, 350,000 investors average $200. Counsel gets $34 million.

8. Knight Rider Papers, columnist Dave Barry, reports the *Orafix Denture* case. The named plaintiff got $25,000. 650 people got $7 each. 2,800 people got discount coupons for dental supplies. Counsel got $54,934.57.

9. *In Kind Class Action Settlements, Comment on Fluid Recovery*, 109 Harvard Law Review 810 (1996).[5]

a. Airline price-fixing case: $458 million award, of which $50 million is cash, $408 million is in discount certificates, and $14 million in fees. The court found the economic value to the class "substantially less" than $458 million but approved; p. 813.

b. *Nintendo*: $25 million in $5 coupons. Fees and administrative costs $1.75 million; p. 813.

c. Fraudulent insurance case, a proposed $47,215,400 in scrip for class members to buy life insurance and $26 million in fees was rejected by the court; p. 814.

d. In the *General Motors* case in the Third Circuit, the district court approved, but the circuit court rejected, an award of $2 billion (more or less) in coupons for new purchase of General Motors vehicles and $9,500,000 in fees. The court found this to be simply a skilled merchandising mechanism by General Motors; p. 814-15.

e. Attached Wall Street Journal commentary of Professor John Coffee and Susan Koniak.

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[5]A superb essay.

PAYMENT SUMMARY

ID NUMBER:	917-3101393103	PHONE NUMBER:	
VOUCHER NO:	0000257005	VOUCHER DATE:	09/20/96

This check represents your rebate in final settlement of the DeBoer Vs. Mellon Mortgage Company lawsuit of which you were notified by notice dated December 23, 1993. The settlement in the suit has now been finalized. Should you have any questions, please contact the plaintiffs' attorneys, Zimmerman and Reed at (612) 344-0099.

Mellon Mortgage Company
3100 Travis Street
Houston, Texas 77006

60-160/433

[redacted] 09/20/96 0000257005

PAY: ZERO DOLLARS 00 CENTS

VALID FOR 180 DAYS

917-3101393103

$**********0.00

AUTHORIZED SIGNATURE

MELLON BANK, NA
PITTSBURGH, PA 15259-0001

⑈0000257005⑈ ⑆043301601⑆ 031-4870⑈

$19.60 per Client; $28M for Lawyers

Imbalance of Synthroid settlement is challenged by two state AGs.

By Karen Donovan
NATIONAL LAW JOURNAL STAFF REPORTER

ILA F. NATION, of Boulder, Colo., has been taking Synthroid, a prescription drug that controls thyroid problems, for 30 years. Now, she is among the millions of Synthroid consumers in a global class action charging that the drug's makers for more than seven years suppressed the publication of a medical study that concluded that the drug's generic equivalent worked just as well.

Under a proposed settlement, consumers such as Ms. Nation will likely receive $19.60 each—if all of the estimated 5 million users of the drug read published notices of the settlement in the newspaper and file a claim.

For producing this result, plaintiffs' lawyers, led by law firms that include New York's Milberg Weiss Bershad Hynes & Lerach L.L.P. and San Francisco's Lieff, Cabraser, Heimann & Bernstein L.L.P., are requesting about $28 million in fees—29 percent of the $96 million settlement fund.

"While the proposed settlement...gave me a good laugh, humor does not pay the bills," Ms. Nation wrote to U.S. District Judge Elaine E. Bucklo, of Chicago, who is overseeing the multidistrict litigation. Ms. Nation pays $35.46 for Synthroid tablets, while generics sell for as little as $6. Her letter noted that $19.60 wouldn't cover the price difference of a single purchase.

Along with Ms. Nation's letter are a dozen or so others. But Ms. Nation said she cannot afford to make the trip from her home in Boulder to Judge Bucklo's Chicago courtroom for the March 13 hearing on the fairness of the deal.

In mass tort actions like the Synthroid case, which asserts a class that could be as large as the 5 million Americans suffering from thyroid problems, complaints like Ms. Nation's often go unnoticed. But this time, the attorneys general of two states also are complaining on behalf of consumers. On Feb. 6, Michigan Attorney General Frank J. Kelley and Illinois AG Jim Ryan weighed in with their objection that the plaintiffs' lawyers have not explained why the deal offers their clients just six cents on the dollar and have not justified their fees.

Jim Ryan: The Illinois attorney general says the plaintiffs' lawyers have not explained why clients should get so little, while they collect millions in fees.

Consumer advocates aren't the only ones complaining. Insurance giants, including Aetna U.S. Healthcare Inc., say the deal's sweeping terms blocks them from suing for the millions they paid for Synthroid on behalf of insureds.

A Placebo Deal?

Synthroid's makers, British pharmacy company Boots Co. and Knoll Pharmaceutical, were first sued for the alleged fraud in New Jersey state court, where Knoll's parent, BASF Corp., is based. Seven law firms, among them Milberg Weiss, filed a class action April 25, 1996. The suit came a day after the Wall Street Journal published a front-page story called "Bitter Pill," describing how Boots first sponsored, then tried to block the publication of a scientific study concluding that Synthroid and three cheaper drugs essentially are interchangeable.

About 65 lawsuits have been filed since 1996, seeking treble damages under the federal antitrust and civil RICO laws and state consumer protection statutes. All claims will be released if Judge Bucklo approves settlement of the multidistrict case, which began in the spring of 1997 and was settled by last August.

"This appears to have gone pretty quickly from filing to settlement," said Frederick H. Hoffecker, head of Michigan's Consumer Protection Division.

The suppressed study, by Dr. Betty Dong, of the University of California at San Francisco, suggests that damages could total more than $3 billion. But, said Milberg Weiss' David J. Bershad, "Damages are a very subjective issue here." The Dong study was finally published a year ago, he said, but consumers have not shifted to generic equivalents, making the case difficult to prove.

This explanation has little sway with the attorneys general, who claim that the slow move away from Synthroid *may* be evidence of the defendants' successful campaign to disparage generics. Their brief observes, "This is not proof of lack of injury but of continuing injury." ⊡

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The Weekly Newspaper for the Profession

Class Action Abuse

Plaintiff Bar Divided By Settlements

Tiny payouts, big fees hit by public interest lawyers.

By Bob Van Voris
NATIONAL LAW JOURNAL STAFF REPORTER

CORPORATIONS AND DEFENSE lawyers tend to view Public Citizen and Trial Lawyers for Public Justice—along with other groups associated with consumer advocate Ralph Nader—as little more than the research-and-development arm of the plaintiffs' bar. The groups probe for chinks in corporate America's armor, which are then exploited by private plaintiffs' lawyers.

Yet, in recent years, both Public Citizen and TLPJ have aggressively targeted class action settlements that recover little for class members while surrendering the right of plaintiffs to have their day in court. Much of the groups' motivation can, no doubt, be attributed to principle. But it also reflects an increasing debate among plaintiffs' lawyers over the use and misuse of class actions.

(SEE 'SETTLEMENTS' PAGE A22)

Nader Raiders Fault Usual Allies in Plaintiffs' Bar

[SETTLEMENTS' FROM PAGE 611]

Objecting to class settlements often puts the groups in odds with prominent members of the plaintiffs' bar, including potential co-counsel and, sometimes, group members.

"You are scum; you are absolute scum," Public Citizen co-founder Alan Morrison says Stanley Rosenblatt told him in a Miami courtroom last month. "You are dead."

Mr. Morrison was objecting to a class action settlement engineered by Mr. Rosenblatt, a Miami lawyer representing a nationwide class of nonsmoking flight attendants who claimed injuries caused by secondhand cigarette smoke while working.

Mr. Rosenblatt said in interviews recently he felt Mr. Rosenblatt at the Jan. 26 hearing met by Judge Robert P. Kaye, who had preliminarily approved the deal after presiding for four months over a bitterly fought trial that was marked only after Mr. Rosenblatt and his clients had rested their cases. Mr. Rosenblatt estimated $300 million from the industry to underwrite a research fund for the study of smoking-related illnesses. In return, he agreed to end the trial, give up his clients' right to pursue punitive damages and make other concessions.

He said his firm are to be paid $49 million, but he didn't vote a client for the class members. That is why Mr. Morrison and five other lawyers, representing 36 objectors to the settlement, were in the courtroom.

For his part, Mr. Rosenblatt says he was unhappy having to respond to the objections of lawyers who arrived on the scene at the last minute to criticize what he believed was the best deal available to the class. He denies selling any objector a seat.

In addition to arguing Mr. Rosenblatt, Public Citizen and TLPJ have opposed

Arthur Bryant: TLPJ executive director says the group does not lightly oppose trial lawyers.

settlements negotiated by Weitz & Luxenberg, San Francisco's Cotchett, Pitre, Simon & Bernards, L.L.P., and Cincinnati's Waite, Schneider, Bayless & Chesley Co. LPA—all major players in the plaintiffs' bar and in the world of complex class actions.

The Players

In addition to Public Citizen and TLPJ, lawyers closely opposing the proposed global settlement of asbestos industry liability reached in June. They have been joined by the Association of Trial Lawyers of America, which opposes the panel's focus on the right of plaintiffs to sue the industry, despite the fact that the asbestos deal was put together by prominent plaintiffs' lawyers and is supported by at least three former ATLA presidents.

Mr. Morrison says Public Citizen, which he co-founded with Mr. Nader in 1972, does not receive funding from organized plaintiffs' groups such as ATLA. Rosenblatt, many individual plaintiffs' lawyers do contribute financially to the group—and Mills wonder. On issues like the right to a jury trial and tort reform, their interests are aligned most of the time.

An ombudsman by the group's name, Trial Lawyers for Public Justice is an outgrowth of, but is not a plaintiffs' lawyers. It was founded in 1982—with the encouragement of Mr. Nader—as a nationwide public-interest law firm that enjoys financial and litigation support from the plaintiffs' bar.

Although it has no formal ties to Mr. Nader, says TLPJ Executive Director Arthur Bryant, "Ralph is a friend of the organization." With only six staff lawyers, TLPJ relies heavily on its network of master lawyers nationwide for much of its heavy lifting.

Yet, like Public Citizen, its Class Action Abuse Project courts the wrath of individual plaintiffs' lawyers by challenging their settlements and fees.

"As an organization funded primarily by contributions from trial lawyers, we did not go into this area lightly," says Mr. Bryant. But he says that by the early '90s, the problem of collusive class settlements became impossible to ignore, spurring TLPJ to inaugurate its Class Action Project in late 1993.

Motivation

In the world of complex litigation, a lawyer's motivations become, well, complex. With millions in settlement money on the table for a case that may not be difficult to win, even the most morally fastidious lawyer must have difficulty serving one perfectly interests from those of the client.

By all indications, Mr. Rosenblatt believes he got his client the best deal available. He and his wife, Susan, took on the class action in 1991, when Fly Tobacco was embarrassed in court and no one would take the case. Moreover, the prospect of showing that exposure to secondhand smoke was the cause of each individual illness was daunting.

In addition, the settlement is supported by some plaintiff lawyers Brain, as well as the other flight attendants' plaintiffs representing the class. John F. Rosenthal III, a professor at George Washington University National Law Center and director of the tobacco-industry, filed a brief in support.

But Boston University School of Law Prof. Susan Koniak doesn't much care whether the players making class action deals are impelled by self-interest, by supremacy or even by the power of motion. "When it comes to people with enormous power and resources, their motivations don't matter as much as the effects of their actions," she says. "We have to stop examining people's souls and worry about what they do."

While Public Citizen and TLPJ are the only groups that consistently attack class-action settlements from a public-interest perspective, they have an monopoly on the ability to be staff and a cynical-sounding deal. For example, Eric Olson, a solo practitioner in Jensen Beach, Fla., was the first to object to the *Brain* settlement. And in January, plaintiffs' lawyer Michael Malakoff of Pittsburgh's Malakoff Doyle & Finberg P.C. urged the 3d U.S. Circuit Court of Appeals to overturn a deal that would receive some 10.7 million potential claims against the Prudential Insurance Co. [WLJ, 2-9-96.] Public Citizen filed an amicus brief.

Lawrence Schonbrun, a Berkeley, Calif., solo practitioner, devotes most of his practice to objecting to class settlements and attorney fees. Then he applies to the court for his own fees. Mr. Schonbrun also objected to *Brain*.

Perhaps the most prominent settlement killer is Fred Baron, of Baron & Budd, in Dallas, whose firm negotiated a massive asbestos liability settlement which was eventually thrown out by the U.S. Supreme Court last year. *Amchem Products v. Windsor*, 117 S. Ct. 2231. He says his firm has spent $3.5 million-$4 million opposing this and another asbestos class settlement—the latter upheld today by the 6th Circuit and a likely candidate for Supreme Court review next year. *Georgine v. Amchem*, 96-60635.

"Fred is a prima," says Mr. Morrison, while acknowledging that Mr. Baron has some financial interest in the outcomes of the cases. He first has made millions litigating tank car cases, including individual asbestos injury claims that would be resolved by the settlement. But Mr. Baron says he was offered "a very, very large amount of money" not to object.

Working with TLPJ, Mr. Baron's firm has objected to other settlements in which the prospects for recovery were, at least, dim. Mr. Baron is serving a one-year term as president of the TLPJ Foundation, which funds TLPJ.

In contrast to these examples, class action critics say, many private objectors are no better than the settlement architects. Critics generally use the same law for class legal frankfurters: "bottom feeders."

Part of the problem is that their motivations may be out of whack. Usually, lawyers representing objectors award ask the court to grant them from the class recovery. But a lawyer asking the court to deny compensation to himself, in effect, asking the court to jurisdiction the fund from which objectors would have would be paid. "The problem is that the utterly successful objector gets no fee, and the partially successful objector gets a fee," says Public Citizen staff attorney Brian Wolfman.

So where does the money come from?

Alan Morrison, co-founded Public Citizen with Ralph Nader in 1972 and later objected to flight attendants' settlement with tobacco industry

From a slightly rounded deal, ostensibly similar to keep the defense and class representatives from balking, but with enough economic clout to convince a judge that objectors' concerns have been addressed.

Class lawyers may pay individual objectors to go away, or they may buy off objecting lawyers by cutting them in on co-counsel and giving them a share of the fees.

"The world of objecting is full of lawyers who raise legitimate objections just so they can be paid off to go away," says Professor Koniak. "They're in it because of extortion. And this is from someone who thinks most of these fairness conferences exist to help lawyers."

Critics say much of the blame for abusive class settlements on the feet of judges, who, they say, often fail to scrutinize class settlements adequately.

Judges have an incentive to do the bare eyes, says Prof. John C. Coffee Jr., of Columbia University School of Law. One of the quickest ways a judge can make a name is to resolve a complex, multistate class action and provide relief to deserving victims, while at the same time clearing hundreds, thousands—even millions—of cases from the docket.

Objectors supply only a partial solution. "The objector's role is that of the settlement until the judge grants preliminary approval," says Professor Coffee. "The judge then becomes a proponent of the settlement. As a practical reality, it's the opposition court, rather than the trial court, where the settlement is going to be overturned."

In the *Brain* case, for example, trial judge Robert P. Kaye granted final approval of the deal Feb. 5. As a result, Public Citizen is considering an appeal.

A Guidelines Solution?

The National Association of Consumer Advocates, a group made up primarily of plaintiffs' lawyers, adopted guidelines in November designed to curb abusive class action settlements.

"It's at least the law bar," says Stephen Gardner, a Dallas lawyer who helped draft the guidelines. "They're intended to say, 'If you don't do this, Lord help you.'"

A lot of the class action lawyers are very good lawyers, they're just bad people," says Mr. Gardner. "They are willing to take settlements that are a Possible village of relief to justify fees," he adds, referring to the 18th century French general said to have wrested his villages to improve Catherine the Great.

The guidelines mention against settlements reached when class actions are pending in other jurisdictions. This situation can result in what Professor Coffee calls a "reverse auction," pitting plaintiffs' counsel in a bidding war to deliver a settlement to the lowest cost to the defendants.

They also counsel close scrutiny of so-called "coupon settlements." These are deals in which at least part, sometimes all, of the relief is in the form of a discount or certificate requiring class members to buy a product or take action to redeem a certificate.

Misuse of ay-you relief is another target of objectors. Cy pres settlements provide money for the indirect benefit of the class, rather than to class members themselves.

The guidelines will be published in Federal Rules Decisions in March, persuading judges and lawyers to read—and just as important, cite—those guidelines in future class actions. ■

Stephen B. Gardner: The Dallas lawyer helped draft guidelines to curtail abusive class action deals

The Latest Class Action Scam

An alarming new pattern is developing in class action litigation. More and more frequently, large nationwide class actions, sometimes involving millions of class members, are being settled in state courts—often in tiny towns far off the beaten track and often on terms that give the class members far less relief than they typically would obtain in individual lawsuits.

Two recent examples have received extensive publicity. This newspaper reported last month on the settlement of the largest property-damage class action in U.S. history, covering an estimated six million Americans who owned homes with

Rule of Law
By John C. Coffee Jr.
And Susan P. Koniak

defective polybutylene (PB) plumbing and an additional unknown number of persons who will someday own these homes. The case was settled in a state court in Union City, Tenn.—not usually the forum for major commercial litigation.

More revealing, however, was the settlement process: Virtually the same settlement had been submitted for approval to a state court in Texas. When the parties could not persuade the state court to approve their proposed deal, they refiled the action in a Texas federal court. After encountering difficulties there, also, they promptly moved to Tennessee.

In the meantime, another group of plaintiff's attorneys filed an identical nationwide class action in Alabama. For a time, like dueling banjos, the two teams of plaintiff's attorneys competed for clients, trading accusations of misconduct and running rival newspaper and TV ads. The result was bills to confuse eligible homeowners and to create a competition that defendants could exploit.

Eventually, a state court judge in California negotiated a truce between the warring factions. But as the Journal's reporter concluded, the revised settlement on which the two factions agreed did little to improve benefits for the class. Rather, it mainly assured both groups of plaintiff's attorneys that they would receive court-awarded fees.

The day following the Journal's story, the New York Times reported an even more egregious example of class action abuse. Bank of Boston agreed to a settlement under which it would deposit up to $8.76 in each class member's bank account (to compensate them for excessive escrow charges) and then deduct upward of $100 from many of those accounts to pay the plaintiff's attorney fees. Although this left many class members poorer than if the action had not been brought, the settlement was nevertheless approved in an Alabama state court—far from Bank of Boston's home base.

What is happening here? Dubious "scrip" settlements in which class members receive coupons to buy a new and improved version of the defendant's formerly defective product, usually at only a modest discount off the retail value, are a well-known phenomenon. They are ostensibly a device to inflate the value of the settlement because the plaintiff's attorneys' fees typically are based on that inflated value (usually one-third). Recently, federal courts have shown a greater skepticism of nonpecuniary settlements that give little value to the class but award high fees to their attorneys. If a settlement is of doubtful value, the parties are increasingly apt to present it to a less sophisticated (or as the plaintiff's attorneys might put it, more "cooperative") state court.

The Supreme Court has just heard argument in a case that will test whether state courts can approve class action settlements even in cases that legally can be litigated only in federal court. If it is possible for state courts to settle cases that they cannot hear, the migration of cases to state court—and the number of doubtful settlements—will predictably accelerate.

Other reasons also make state courts a more inviting forum for pre-arranged settlements. First, if the state court refuses to approve a settlement, the settling parties can just take their show on the road to another court in another state, as happened in the PB plumbing settlement. Eventually, they will find a court willing

> *The PB case was settled in a state court in Union City, Tenn.—not usually the forum for major commercial litigation*

to oblige their desire to trade a small settlement for high attorneys fees.

Second, major corporate defendants are often sued in multiple forums. Once rival and overlapping class actions are pending in different courts, defendants can play plaintiff's attorneys off against each other, running what is in effect a reverse auction to gain the cheapest settlement. Paying the class's lawyers to sell out their clients is invariably cheaper for defendants than paying the class.

What, then, should be done? Some will say: Abolish class actions! But this would only cost corporations more because it is much more expensive to defend many individual actions than the class suit. Nor would it benefit victims.

A more sensible starting point is to recognize that the problems of competing class actions cannot arise on the federal level. In the federal system, a single judicial body—the Judicial Panel on Multidistrict Litigation—has the power to consolidate related actions before a single court. This procedure works reasonably well and could be extended to state courts by legislation giving the federal panel power to consolidate class actions brought in state courts that seek to represent a nationwide class of plaintiffs.

But this cannot be the entire answer. Collusive class settlements, in which the class members' interests are subordinated to those of their attorneys, occur in federal court as well. Individual trial judges simply have inadequate incentives to resist parties who want to settle and too little information to recognize when the settlement is collusive.

Thus, another part of the solution may be the traditional American one: Sue the so-and-sos! The bank customers who ended up worse off after their class settlement are now seeking to sue the bank and the attorneys for both sides who concocted this bizarre deal.

Another hope may be special monitors. Sen. William Cohen (R., Maine) has proposed that notice be given to state attorneys general in all consumer class actions settlements that seek to bind a nationwide class in the hope that they could intervene to resist a sellout. He has also proposed that class members receive notice written in plain English. Again, these ideas have promise, but they fall short of a complete remedy.

In truth, there is no panacea. But the courts, the bar and the press must recognize the need for closer oversight of class actions. Many in the bar would like to view abusive settlements as exceptional and rare. They are not. A Gresham's Law is developing under which "bad" class actions—and bad plaintiff's attorneys—are driving out the good ones.

Mr. Coffee teaches law at Columbia University, and Ms. Koniak teaches law at Boston University.

EXHIBIT C

II. THE IMPORTANCE OF RULE 23 CLASS ACTIONS

While used somewhat sparingly, when invoked, Rule 23 class actions have played a critical role in protection of the environment, public health and safety and consumers rights. For example, they have proven especially appropriate where large numbers of citizens have suffered property damage or other environmental insult, requiring redress but often in circumstances where thousands of individual actions would be entirely impracticable. (See, e.g., In re Three Mile Island Litigation, 87 F.R.D. 433 (M.D. Pa. 1980) (class action of individuals harmed by TMI occurrence); In re Asbestos School Litigation, 789 F.2d.2d.2d 996 (3d Cir.), cert. denied, 479 U.S. 852, 479 U.S. 915 (1986) (national class of school districts suing asbestos industry for asbestos cleanup); In re Agent Orange Litigation, 818 F.2d.2d.2d 145 (2d Cir. 1987) (class of veterans exposed to toxins in Agent Orange); Pruitt v. Allied Chemical Corp., 85 F.R.D. 100 (E.D. Va. 1980) (class action by workers in seafood industry); Cook v. Rockwell, 151 F.R.D. 378 (D.Co. 1993) (class action challenging discharge of radioactive substances from Rocky Flats); Cape May County Chapter of Izaak Walton League v. Macchia, 329 F.2d.2d. Supp. 504 (D.N.J. 1971) (class action challenging pollution of tidal areas from dredging from development project); Wehner v. Syntex Corp., 117 F.R.D. 641 (N.D. Cal. 1987) (class action certified to recover response costs for dioxin contamination).

The use of the class action device under Rule 23 has been essential not only in the so-called "mass tort" context, of which the asbestos litigation is the most prominent example, but also, and increasingly, where environmental incidents have caused damage to natural resources or property interests. The most recent and dramatic example, of course, involved the Exxon-Valdez oil spill resulting in enormous damage not only to natural ecosystems but also to real property, fishing rights, tourism and other economic interests. The availability of Rule 23 class certification was essential to obtaining necessary redress for the people of Alaska from this catastrophe. After several months of procedural wrangling by the parties, the defendant Exxon successfully moved for a mandatory punitive damages class which, over plaintiffs objections, was certified by the

District Court.

Had the proposed Rule 23 changes now under consideration been in place, it is doubtful whether any widespread relief would have been obtained for Alaska citizens, and it is likely that multiple individual actions would still be flooding the state and federal courts in Alaska. For example, the proposal that Rule 23 certification must be "necessary" rather than merely "superior", as discussed below, could be viewed as allowing class actions only where individual actions could not be brought. Since many individual suits were indeed filed in Alaska, it is questionable whether the necessity test under the proposed rule would have been satisfied even though a class action was a superior litigation tool. Without this option, many thousands of additional suits by injured Alaska residents would surely have overwhelmed the federal and state courts. Instead, the class action device was instrumental in achieving a $5 billion jury verdict that is soon to be allocated among the numerous injured plaintiffs.

Class actions certified under Rule 23(b)(3) have not been frequently used, nor have they resulted in unreasonable awards. A comprehensive 1991 American Law Institute study of environmental injury litigation from 1983 through 1986 found that total awards were consistently reasonable and significantly less than the few monumental settlements achieved in prominent mass tort cases such as the Agent Orange litigation. (American Law Institute Reporter's Study, Enterprise Liability for Personal Responsibility at 319-21 citing Love Canal Actions, 145 Misc. 2nd 1076, 547 N.Y.S. 2nd 174 (1989) ($20 million award to over 100 plaintiffs claiming Personal injury and property damage); Ayers v. Jackson Township, 106 N.J. 557, 525 A.2d 287 (1987) (compensation for loss of palatable water for twenty months and medical monitoring but no personal injury awards); In re Three Mile Island, supra, (initial settlement of $24 Million for economic and property damage; second settlement of $15 million for medical injuries; $5 million for medical monitoring). In attempting to explain this phenomena, the ALI reporter urged that we "recall that even conservative estimates indicate that there are over 10,000 environmental carcinogen deaths each year, so it is evident that environmental injury victims have enjoyed very little tort success. . . . Why are there so few of these claims? The answer is that environmental injury tort cases are difficult to win." ALI Study at 321.

Since World War II American society has experienced enormous technological change conferring vast and incontrovertible improvements in our quality of life. However, new technologies like nuclear power, petro-chemicals and biotechnology often come with attendant risks and potential economic costs. And the federal courts, usually reluctantly, but ultimately have become the fora where the external costs of these new technologies can best be addressed. From Exxon-Valdez to Three Mile Island to Love Canal, when needed, class action remedies have worked effectively, and there is every likelihood they will be even more necessary in the future. Proposals that would make Rule 23 certification less available at the very time that the courts -- and the public -- are coming to terms with these dramatic changes in our science and economy would seem ill-considered at best.

Similarly, in the context of consumer cases, the claims themselves are often too small to support individual litigation. Without class certification, there is no redress for vindication of these claims, no matter how widespread. The Supreme Court has said that class certification is an important tool for litigating small claims that would otherwise not be heard. Phillips Petroleum Co. V. Shutts, 472 U.S. 797, 809 (1985) ("Class actions may permit the plaintiffs to pool claims which would be uneconomical to litigate individually"). Without the important tool of Rule 23 class certification, consumers would have no weapon against unlawful conduct and the wrongdoer would be able to keep the proceeds of legal violations while having no deterrence from committing similar violations in the future.

EXHIBIT D

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HUGO L. BLACK

May 2, 1969

Mr. John P. Frank
114 West Adams Street
Phoenix, Arizona 85003

Dear John,

Thanks for sending me your dissent to Rule 23(b)(3) concerning which I wrote in my opinion in Snyder v. Harris. I certainly agree with you that that rule is a very poor one and I am glad to know that you agreed with me at the time it was passed.

Best regards to you and the family.

Sincerely,

Hugo L. Black

hlb:fl

Mr. COBLE. Thank you, Mr. Frank. Professor Koniak, you have very patiently awaited your turn. We look forward to hearing from you.

STATEMENT OF SUSAN P. KONIAK, PROFESSOR, BOSTON UNIVERSITY SCHOOL OF LAW

Ms. KONIAK. Thank you. I appreciate the opportunity of speaking to this committee about this important topic.

Abuse in class actions is rampant. The world of class action practice is a world in which plaintiffs' lawyers get rich by selling out their clients.

It is a world in which corporate defendants dispose of serious liability at bargain basement rates; paying pennies on the dollar for the serious injuries they cause and the frauds that they perpetrate.

It is a world in which judges, and I include in this category Federal judges as well as State judges, are more interested in clearing their dockets and keeping lawyers happy than protecting the absent class, which is supposed to be the job of a judge in a class action.

It is a world in which class members end up with worthless coupons or pennies on the dollar for injuries that may cause their death or serious illness. It is a world of corruption, dirty dealing, shotty work, and greed.

Unfortunately, most Americans will have direct contact with our judicial system only through the class action process—by being a member of some class, and what they are likely to see is the world I have just described.

This world of corruption flourishes because there is too little law regulating what can and cannot be done in connection with a class action. There are almost no rules in this world. The same judge who orchestrates and all but writes a settlement may sit in judgment on that settlement to decide whether it is fair.

Defendants may offer class counsel all kinds of inducements, including side settlements, to get them to accept a settlement that is bad for their own clients, the class, and sells them out.

Class counsel can offer other lawyers money, a piece of the action, a piece of class counsel fees for walking away and not giving their objections, which might expose to the court the problems with the settlement class counsel proposed.

Class counsel may, at the request of a defendant, amend the complaint to include some bogus request for an injunction that is designed to do nothing more than take away the right of the members of the class to opt-out, lock them in under Federal Rule of Civil Procedure 23(b)(1) or (b)(2), (b)(2) in the case of an injunction, so that no one has a choice about being in the class action.

So, unlike the other people on this panel, I want to emphasize that the only problem here is not 23(b)(3). People with serious injuries are being locked into class actions at the request of defendants who want to make sure as much liability is dumped as possible for the lowest cost. That is a problem involving (b)(1) and (b)(2) of Rule 23.

Corporations are not the major victims of class action abuse. They have learned to use the system to their advantage. They have learned to use it to get away with paying less than they should—

no punitive damages and not even actual damages for the injuries they cause.

They have also used the abuse they help perpetrate as a reason to push legal reforms that would take away the rights of the real victims, the class members.

My concern is not that class actions plague corporate defendants. I do think there is a problem with frivolous lawsuits and it should be corrected. This Congress should never have approved the amendments to Rule 11, which gutted the rule that was designed to take care of frivolous lawsuits, whether they be filed by plaintiffs or whether they be frivolous defenses filed by defendants.

That rule has been gutted. I suggest that the Judiciary Committee revisit that as a way of dealing with frivolous lawsuits. Revising the class action rule is not the place to address the question of frivolous lawsuits, doing so would correct only half the problem—the frivolity of some plaintiffs' suits. That is a biased and unfair approach.

The cost of corruption should not be born by the victims of the corruption. And the true victims here are the ordinary and hard working Americans whose rights are now being violated by the players in this system.

If the result of these hearings is law that takes away the rights of Americans in the name of protecting those Americans, it will be a travesty.

I believe in our tort system. I believe that judges should have taken responsibility for cleaning up this mess. They did not.

I believe that the Advisory Committee on the Federal Rules of Civil Procedure acted irresponsibly in proposing an amendment that would have removed the few restrictions that exist in this area to restrain collusion and misconduct. I helped organize a group of law professors to protest that change. I am happy to say that it was dumped.

As to Public Citizen, which was mentioned by a fellow panelist, I must say on its behalf that it did not only stand up against the abuse in one lawsuit. Public Citizen has taken a principled view and has objected to high attorneys' fees and selling our classes in other lawsuits, in many other lawsuits. I believe it is one of the few institutions to take action against dirty plaintiffs' lawyers working to stop those lawyers from getting away with what they have been getting away with.

I believe the plaintiffs' bar is an important check on the misuse of corporate power. It works to deter excesses, such as those that are being revealed in the tobacco documents.

Corruption does not cease to be corruption because it is practiced by people on my side. Let me explain my side. If Mr. Frank is liberal, I am falling off the left end of this table.

Yet, I have been an outspoken and consistent critic of the plaintiffs' bar, their greed, their lack of concern with the people they are supposed to be representing. I am sickened by conduct like that. It demeans all of us. To ignore the corruption of one's one is unprincipled. We have all too much of that in this city and elsewhere.

I urge this committee to take seriously writing law or encouraging others to write law that restrains judges, that restrains defend-

ants, and corporations from buying up plaintiffs' lawyers, and that restrains greedy and unethical plaintiffs' lawyers.

A law professor of mine, Grant Gilmore, wrote that in hell there would be only law and that due process would be meticulously observed. I believe that in hell, there will be no law, like there is none in the class action world.

In hell, I believe there will be no law, due process will be an empty phrase that protects no one and the principled will be used to tear down that which they most seek to preserve. I stand against that vision of hell. I hope you stand with me.

[The prepared statement of Ms. Koniak follows:]

PREPARED STATEMENT OF SUSAN P. KONIAK, PROFESSOR, BOSTON UNIVERSITY SCHOOL OF LAW

SUMMARY

Abuse in class actions is pervasive; collusion and self-dealing are rampant. And the reason is too little law, not too much. The abuse I see as rampant is abuse that victimizes those who are least able to protect themselves—the absent class members who are plagued by self-interested lawyers, defendants who know how to exploit the weakness and/or greed of class lawyers and judges more interested in clearing dockets than protecting the absent class, which is supposed to be their job.

Defendant corporations and their lawyers have figured out that it is cheaper to pay off class lawyers than to pay off the class; class lawyers have figured out that they can make more money by charging the defendant a fat fee for making a bad deal for the class than they could make by fighting the defendant on the class' behalf; the courts have figured out that they can clear their dockets and state judges can be assured of generous contributions for their election campaigns from the bar if they approve any settlement placed before them. In the class action world there are almost no rules that limit what the players may do. The same judge who orchestrates (and all but writes a settlement) may sit in judgment on whether the settlement is fair. The defendant may offer class counsel all kinds of inducements (including overly generous settlements in other cases) to get class counsel to sign off on a bad deal for the class. Class counsel may offer other plaintiffs' lawyers a piece of the action (a share of counsel fees or other payoffs) to ensure that those lawyers do not show up with objections to a class settlement. Without law to limit these actors, collusion and self-dealing flourish.

Judges, through their power to interpret the rules of procedure, could and should have prevented this lawlessness. They did not. The Advisory Committee of the Judicial Conference should have proposed responsible reforms. It did not. These hearings may help by prodding those actors. We need law that restrains defendants, that restrains plaintiffs' lawyers and that restrains judges—law that stops these actors from trading away the rights of the absent class. If these hearings help us get such law, they will have served a noble purpose. If, on the other hand, these hearings result in law that imposes the costs of corruption on the victims of that corruption—law that takes away the rights of Americans in the name of preventing others from ripping off those rights—there will be no cause for pride. The victim of abuse should not be the ones who pay.

I believe in our tort system and in the plaintiffs' bar, which is essential to that system. I believe those institutions play an important role in deterring the worst excesses of corporate power, excesses like those on display in the tobacco documents now finally being released to the public. But corruption does not cease to be corruption because it is practiced by people "on my side" or exists within an institution I support. So I have spoken out and will continue to do so. To ignore the corruption of one's own is unprincipled. We have all too much of that. A brilliant legal scholar, Professor Grant Gilmore wrote that in hell there will be nothing but law and due process will be meticulously observed. I have, however, come to believe that his description of hell was wrong. In hell, it now seems to me, there will be no law, due process will be consistently ignored and the principled will be used to tear down that which they seek to preserve. I have taken my stand against such a hell. I trust you will all stand with me.

STATEMENT

The idea that America is overrun with law, that America and Americans are choking on all the law that has been stuffed down our throats—that idea has become so widely accepted that hardly anyone bothers to question it anymore. On this matter almost everyone seems to agree. Politicians and pundits, lawyers and legal academicians, economists and editorial page writers are all singing the same tune: we need less law and we need it now. Well, abuse in class actions is pervasive; collusion and self-dealing are rampant. And the reason is too little law, not too much.

Let me begin by explaining what I mean by abuse. I mean actions taken by class counsel, sometimes alone, but more often in cooperation with the defendant and defense lawyers that benefits class counsel and usually, if not always, the defendant at the expense of the class. The abuse I am concerned with victimizes those least able to protect themselves in this process: absent class members. Others may encourage this Committee to see the great wrong in class action practice as frivolous class suits that plague corporate defendants. This is not my concern. There is no reliable way to assess whether class suits are more or less likely to be frivolous than nonclass suits. However, if frivolous suits are the concern it is not Rule 23, the class action rule, that needs amending but Rule 11, the aim of which is to deter bogus lawsuits and bogus defense claims.

If frivolous suits are the problem, then Congress should have rejected the Judicial Conference's proposal to gut Rule 11, Before it was amended, Rule 11 mandated sanctions for asserting frivolous defenses or filing bogus lawsuits. That rule no longer insists that courts sanction those who bring frivolous suits or assert frivolous suits. Instead it offers lawyers a safe harbor. If a lawyer gets caught by the opposition having asserted a frivolous claim or a frivolous defense, that lawyer will incur no penalty if on being caught he retracts the bogus court paper. That just invites lawyers to file bogus pleadings and defenses. Amending Rule 11, which treats bogus complaints and bogus defenses as equally objectionable, is the natural and even-handed way to address the problem of frivolous suits. Amending Rule 23 to make it more difficult for wronged consumers to sue corporate defendants by banding together in a class looks less like an honest effort to address unworthy lawsuits and more like an effort to protect corporations from lawsuits even when those lawsuits are meritorious and might deter similar misconduct by others in the future.

The abuse I see as rampant is abuse that victimizes those who are least able to protect themselves—those who lack the resources and sophistication of corporate defendants or plaintiffs' lawyers. I am concerned with abuse that harms ordinary, generally working class, Americans, the absent class members who are plagued by self-interested lawyers, defendants who know how to exploit the weakness and/or greed of class lawyers and judges more interested in clearing dockets than protecting the absent class, which is supposed to be their job.

Is abuse of absent class members as pervasive as I claim? I could regale you with anecdote after anecdote of abuse. Worthless coupon settlements; settlements that leave class members poorer than before the settlement was reached; defendants who agree to pay exorbitant sums to settle cases in class counsel's personal inventory in exchange for class counsel accepting some class settlement that compromises the claims of absent class members for pennies on the dollar; class lawyers who impede class members from exercising their right to opt out of the class; defendants who pay off objecting counsel to drop their objections; and judges who encourage all the conduct I have just described, not just by turning a blind eye to obvious corruption but sometimes by suggesting themselves that some of these methods be employed.[1]

My conviction that abuse is rampant is based on much more, however, than these anecdotes or the fact that I have great difficulty bringing a clean class settlement to mind. While the class is interested in the size of the settlement, class counsel who often has little personal connection to the absent class is primarily interested in the size of his fee. Unlike ordinary clients, whose lawyers also may care more about their fee than the size of the clients settlement, absent class members do not choose their lawyer, cannot fire their lawyer and are generally incapable of monitoring what the class lawyer is doing or not doing for them. Defendants, of course, understand all this. In short, class lawyers are much easier for defendants to buy and defendants know it. This is the reason Rule 23 requires that all class settlements be approved by a court. But judges have little incentive to ferret out collusion and even less ability to do so. Little incentive because class settlements clear dockets,

[1] For a detailed description of abuse in one asbestos class action, see Koniak, Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc., 80 Cornell L. Rev. 1045 (1995). For other anecdotal evidence, see Koniak and Cohen, Under Cloak of Settlement, 82 Virginia L. Rev. 1051 at 1053–1102.

end cases and save judicial time and resources. But even if all judges were well motivated to find collusion, how would they do so? Class counsel and defense counsel make coordinated presentations to convince the court that the settlement is valuable, the class claims weak, potential defenses formidable and the attorneys fees to be awarded class counsel eminently reasonable. How is a court to know any different? There are often no informed objectors represented by counsel to argue against the dog and pony show put on by the settlement's proponents. For all these reasons I am convinced that abuse is pervasive. I turn now to my second proposition: that what is needed to curb this pervasive abuse is more law, not less.[2]

What do I mean when I say there is too little law governing class actions? Consider the following examples. Do class members have the right to exclude themselves from a mass tort class action and elect to sue (or not to sue) as individuals? As things stand now, the law provides no answer to this question. In other words, whether class members can be locked into a class suit or class settlement is a matter not governed by legal rules but rather by the desires of class counsel and the defendant and by the inclinations of the class action judge.

The law does not describe what information about class counsel and class counsel's fees class members are entitled to receive before deciding whether to exclude themselves from the class, to object to the appointment of class counsel or to object to a settlement proposal. No law states what information, if any, about a proposed class settlement class members are entitled to receive before deciding whether to protest the settlement. Must each class members be given at least enough information to understand what rights she is releasing and approximately what she can expect to got in return for releasing those rights? No law requires that a class member be given enough information to assess what a settlement is likely to do for him.

What discovery, if any, must a court grant objectors to a class certification or a class settlement? No legal rule. No law addresses what class counsel or the defendants must disclose to a court that is being asked to certify a class or approve a settlement.

What process must a court follow before approving a class settlement? The law is silent on that question. And while most courts, despite the law's silence, hold what are commonly called fairness hearings before approving a settlement, no particular rules need be followed in those so-called hearings. There is no legal requirement that evidence be presented or witnesses subjected to cross-examination by objectors. I have sat in a fairness hearing in federal court in which class counsel presented no witnesses to support its estimate of the settlement's value, although experts on such matters had been flown by class counsel in from around the country at money to be paid out of the class award so they could stand up from their seats in the gallery to let the federal judge see them while class counsel summarized what they might say were they asked to speak, which none of them was asked to do. And that ridiculous show and tell exercise has been repeated in other fairness hearings in which judges were approving settlements that class counsel asserted were worth millions of dollars, figures no one confirmed through testimony given under oath and subject to cross-examination.

All that is clear about the lawless, anything-goes-approach that characterizes so-called fairness hearings is that almost no information is presented for anyone to hear and nothing about the process seems particularly fair. It is, for example, routine for courts to require objectors to file their objections to the settlement before the proponents of the settlement (class counsel and the defendant) file the documents that support the settlements. Requiring the critique before the justification is absurd. But where there is no law anarchy may rein.

No law imposes any specific obligations on class counsel. What information class counsel must disclose to its supposed clients, the class, is nowhere delineated. Can all details of the tradeoffs made on behalf of the class be kept from the class? If so, on what grounds? No law prohibits the defendant from choosing counsel for the class. In other words, courts do not automatically disqualify class counsel who has been hand-picked by the defendant to represent the class presumably because the defendant knows this lawyer will be easy to roll. Does such a practice seem kosher to anyone?

The judge responsible for assessing whether a settlement is fair may have been a chief architect of the settlement that he is now supposed to evaluate as a guardian for the class. Obviously, such a judge could be expected to be heavily biased in favor of a settlement he helped draft. Yet no law requires that the fairness hearing judge form his judgment on the settlement after the hearing as opposed to before it. Indeed, all those familiar with such hearings know the dirty little truth that these

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[2] The point made in this paragraph is more fully developed in Koniak and Cohen, *supra* note 1 at 1102–1140.

hearings are by and large sham proceedings in the sense that the judge walks into the hearing having already decided to approve the settlement come what may. By using our courts to conduct such sham proceedings we invite the American public to view other judicial proceedings as mere show trials. We should not be traveling down that road.

With so little law, virtually anything goes, and the chief victims of this freewheeling system are not corporate defendants and their shareholders who stand to gain from much of the lawlessness I have described, but the class members who have sustained genuine and serious injuries. However great one imagines the damage to corporations is from bogus class suits, any harm being done to well-heeled, well-represented corporations pales in comparison to the harm being done to ordinary American citizens who have legitimate causes of action for grievous wrongs who are being sold-out on the cheap by people supposedly representing their interests, class lawyers. The lawlessness of class action practice victimizes ordinary, hard-working people, and this lawlessness undermines the integrity of our judicial system.

Defendant corporations and their lawyers have figured out that it is cheaper to pay off class lawyers than to pay off the class; class lawyers have figured out that they can make more money by charging the defendant a fat fee for making a bad deal for the class than they could make by fighting the defendant on the class' behalf; the courts have figured out that they can clear their dockets and state judges can be assured of generous contributions for their election campaigns from the bar if they approve any settlement placed before them. To stop this cycle of corruption some practices must be outlawed. This free-for-all must end before the American public loses confidence in yet another branch of government.

Last year the Supreme Court of the United States took a step in the right direction in Amchem Products v. Windsor.[3] The Court rejected a class settlement that purported to dispose of thousands, perhaps hundreds of thousands, of asbestos claims. The Court said the class was too large and class members claim and interests were too diverse to have been lumped together. One group of lawyers should not have represented all these people, the Court said, because the interests of some segments of the group were antagonistic to the interests of others in the group. For example, those with lung cancer had an interest in minimizing recovery to those with much less serious injuries; those injured now had an interest in big payouts in the present while those who might be injured in the future did not. They would want small payouts now to conserve money for the time when they might fall ill. These various subgroups deserved lawyers dedicated to their interests alone and not lawyers who would sacrifice one subgroup to benefit another.

But the Supreme Court decision in *Amchem* is already being undercut. As read by the Fifth Circuit Court of Appeals in a case decided in the last few months,[4] *Amchem* creates very little law. The Fifth Circuit approved a class definition almost identical to that rejected by the Supreme Court. Moreover, according to the Fifth Circuit, not only was the class definition proper, but such a class could be represented by one group of lawyers. How did the Fifth Circuit distinguish its case from the class action rejected in *Amchem*? In the Supreme Court case class members had been given some idea what they might expect from the settlement and had a chance, at least in theory, to opt out of the class deal. The Fifth Circuit class members were given almost no information on what the settlement might mean for them as individuals, and they had no right to exclude themselves from the class.

Of course, that means that the Fifth Circuit class had fewer rights and less protection from abuse than the class in *Amchem*. Given that the Supreme Court decision was based on its concern that the rights of the *Amchem* class had been inadequately protected, how could the Fifth Circuit have blessed the treatment of a class with less information and less control over its destiny than the class in *Amchem*? In a perverse piece of reasoning, the Fifth Circuit argued that class counsel could successfully avoid the divided loyalty problem of getting one segment of the class more money at the expense of another segment by not bothering to negotiate any amounts for any part of the class. Only in a lawless topsy-turvy world could class counsel avoid the charge of inadequate lawyering by providing clients with less information and negotiating a vaguer settlement, i.e., one that says almost nothing about the allocation of the money. The Supreme Court may share my concerns, but the Fifth Circuit's recent decision suggests that the judiciary is all too prepared to

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[3] 117 S.Ct. 2231 (1997). This is the class action that I critiqued in Feasting While the Widow Weeps, *supra* note 1.

[4] In re Asbestos Litigation, 95–40635, decided January 27, 1998 (5th Cir.). See also that court's earlier approval of this same settlement at 90 F.3d 963 (5th Cir. 1996), vacated 117 S.Ct. 2503, reaffirmed by the 5th Cir. on January 27, 1998.

maintain the lawless status quo even if it takes Alice in Wonderland-like reasoning to do so.

Judges could and should have done more to curb lawyer self-dealing in class action and collusion between class counsel and defendants. The courts could and should have developed rules to regulate class action practice: rules that delineated more clearly the rights of class members to information and rules that reinforced the line between opt-out and lock-in classes instead of blurring it to such an extent that it is difficult to discern a line at all. They could have imposed some obligations on class counsel, requiring them, for example, to disclose to the court unfavorable information about their own qualifications to serve as class counsel, their potential conflicts of interest, the class definition they propose and the settlement they advocate. Remember in most class actions, objectors either do not show up or do not show up represented by independent counsel.

Judges could have outlined rules that would let defendants know what communications with potential class members were appropriate and rules that specified the rights of objectors to discovery. Judges could have insisted that justifications for the settlement be detailed before objections are due. But judges have done none of this. Instead, the judiciary has taken advantage of the lawless environment they helped create and which has thrived on their watch. Judges have used this Wild West, anything-goes, anti-system to get rid of large numbers of lawsuits which would otherwise make their jobs more burdensome and tedious. Judges could and should have cleaned up this mess long before now. But having freed themselves along with class counsel and the defendants from the burden of following legal rules they seem loathe to rein themselves or anyone else in by introducing principle into the law-free zone they have created.

The Advisory Committee on the Federal Rules of Civil Procedure could have presented a responsible redrafting of Rule 23 that provided law where none now exists. Knowing of the problems with class counsel selling out class members for quick profit, the committee could have proposed amendments that imposed some specific obligations on class counsel of candor to the court and of loyalty to the class in the form of outlawed conflicts of interest. It did nothing of the kind. Knowing that almost all class notices were written in a manner that made them incomprehensible to ordinary people and that they rarely contained enough information for class members to make informed decisions on what to do, the Committee could have proposed amendments on those matters. It didn't. It could have set forth fair procedures to govern the conduct of so-called fairness hearings. It could have outlined the rights to be accorded objectors and described how a judge was to discover problems with a jointly proposed class definition or settlement when no objectors were present. For example, in settlements proposing to compromise substantial claims for absent class members it could have required courts to appoint advocates whose job would be to discover potential problems with the settlement. It could have required or recommended that courts appoint experts to assess whether the settlement's value is being inflated by a defendant who wants to buy a cheap resolution and class counsel who wants to take a percentage of the inflated settlement as attorneys fees. The Committee addressed none of these matters.

What it did instead was propose a so-called settlement class rule breathtaking in its flexibility—a rule with virtually no limits that would have only served to vastly increase the opportunities for collusion. In response to this proposal, I helped organize a group of more than one hundred law professors from across the country and across the political spectrum to protest the Committee's alarmingly broad and, in my opinion, irresponsible proposal. I believe our opposition played a role in killing this ill-advised rule change. I have attached a copy of the law professors' opposition letter to this testimony along with a copy of the prepared statement I submitted on my own behalf when testifying before the Advisory Committee on its efforts to revise Rule 23.

But stopping the Advisory Committee from encouraging more lawlessness is not enough. The question is whether it is plausible to believe that the Advisory Committee or the judiciary through its power to interpret the rules of procedure will turn its energies to protecting class members, a subject that has received precious little attention in the past. Perhaps these hearings will encourage the Advisory Committee and the judiciary to consider how lawless class action practice has become and how harmful that is to the people of this country and to the justice system on which we all depend.

Can Congress act more directly to stop the lawlessness by drafting legislation that specifies the obligations of class counsel, the duties and limits on judges assessing the fairness of class settlements, the procedures to be followed in fairness hearings and other such matters? I would like to think so, but I have very serious doubts. I worry that any effort to reform class action practice will get hijacked by those in-

terested not in procedural reform but in reshaping tort law or product liability law. I worry that class action reform will become nothing more than a means of getting rid of small claims class actions, which I believe serve an important purpose.

Changing all opt-out class actions into opt-in class actions would kill small claims class actions without protecting people with substantial claims from the self-dealing and collusion that now plagues the system. Small claims class actions would be killed by switching from opt-out to opt-in because few people will bother to join an action when their individual injury is small. If too few people would opt-in to make a class action viable then perhaps no action should be brought. What good do such suits serve?

First, they deter corporate theft. Corporate theft does not add to our economic well-being as a nation; it subtracts from it. Given the limited and ever-shrinking resources of state and federal government regulatory agencies, their enforcement efforts will never be enough to deter massive corporate fraud committed bit by bit. Small claims class actions are the only effective means of deterring this inefficient, corrupt method of inflating profits. Second, while it may not bother most Americans to lose 10 cents here to corporate overcharging or $1 there, most would see matters differently if each corporation with which one did business could with take $1 extra here and $2 extra there from you with impunity. The aggregate loss to each individual might soon be enough to make most Americans wonder whose interests were actually being served when Congress agreed to smother small claims suits.

An opt-in procedure might go a long way toward protecting from abuse people with substantial claim, but there is nothing to prevent this Committee from writing legislation that leaves small claims class actions as opt-out classes thereby preserving them while making class actions involving substantial individual claims opt-in classes only.

Most troubling, if this Committee tried to "reform" class action practice by transforming all opt-out classes into opt-in classes, it would only succeed in killing small claims class actions while leaving those with substantial claims subject to the abuse visited on them now. Currently, corporations seeking to buy as much finality as possible when settling a class action have found a number of ways to package opt-out class actions as lock-in class actions, eliminating even the possibility of anyone opting out to sue as an individual.

There are two popular techniques for transforming an opt-out (Rule 23 (b)(3)) class action into a lock-in class action (Rule 23 (b)(1) or (b)(2)): (1) the defendant gets class counsel to tack a request for injunctive relief onto a class action for money damages; and (2) the defendant claims that its assets constitute a limited fund that would be inadequate to pay all injured people should they each sue as an individual. Courts eager to accept class settlements have been quite willing to accept either or both of these tactics even when it was obvious that they were being used to deny people the right to exclude themselves from an action and for no other reason.

To ensure that seriously injured class members are not included in class actions without their having chosen to be included would thus require two things: amending Rule 23(b)(1) and (b)(2) to prevent their use to lock-in mass tort victims whose individual claims for monetary damages were substantial; and amending Rule 23(b)(3) to require an opt-in for those same people. Whether or not the second change is sdopted, this Committee should certainly stop the practice of packaging opt-out classes as lock-in class actions. This could be achieved in one of two different ways: precluding the release in a (b)(1) or (b)(2) class action of monetary damages above a certain dollar amount or precluding the release in a (b)(1) or (b)(2) class action of monetary damages arising from a tort claim. Notice that the trigger is claims to be *released* not claims alleged in the complaint. This is important because claims may be settled that are not alleged. If the trigger were claims alleged the ban on locking-in people with substantial monetary claims could be avoided by failing to allege those claims but then releasing them in settlement without class members having the right to opt-in or out.

I have condemned in writing and speech the corruption of plaintiffs' lawyers in class action cases, and I will continue to do so, although I have always been and remain a strong supporter of the plaintiffs' bar and the important role it plays in checking corporate power and deterring corporate misdeeds. To ignore the corruption of one's own is unprincipled and itself corrupt. The fact that so many of our leaders act in just such a way is a sad commentary on the honor of our leaders.

A brilliant legal scholar, Professor Grant Gilmore wrote that in hell there will be nothing but law and due process will be meticulously observed. I have, however, come to believe that his description of hell was wrong. In hell, it now seems to me, there will be no law, due process will be consistently ignored and the principled will be used to tear down that which they seek to preserve. I have taken my stand against such a hell. I trust you will all stand with me.

Mr. COBLE. Thank you, professor.

Thanks to each of you. Now, folks we try to also apply to the 5-minute rule to ourselves. So, if you all could give me terse answers, I will be appreciative.

Professor Koniak, you state that the way to inhibit the filing of frivolous suits is to amend Rule 11. To what extent are frivolous suits, as opposed to collusive ones, the real problem in the class action environment?

Ms. KONIAK. There is no way to answer the question.

When you say real problem: The real problem for whom? Frivolous suits in the class action world are, to hear them tell it, a real problem for corporations who believe such suits abound and waste their resources.

That is not the real problem for ordinary Americans. Corporations use the class action system, but they are not particularly vulnerable to it. Frivolous suits are a problem, if you listen to corporations who have learned to use the class action rule to their advantage. All the while, they complain about frivolous class suits.

I think collusion is a much more serious problem because it involves our judicial system in corruption. It involves our judicial system in the selling out of other people's rights.

Plaintiffs' lawyers doing bad things along with defendants' lawyers doing bad things, and Americans with serious injuries being sold out by these lawyers, being given junk settlements for their injuries—settlements that will not cover their medical bills.

Collusive class settlements take away the deterrence value of law. I will just give you one example. There are many. If corporations do not have to bear the actual cost of the harm that they do, they are given an incentive to do harm. Take the Synthroid case, where a company's drug was much more expensive than generic equivalents. The company tells us all the generic is inferior—a lie.

They say generic products are not substitutable. It makes money. Then class action lawyers get paid off to settle for pennies on the dollar. Every drug company is encouraged to commit the same scam: lie and keep the profits.

We are encouraging misconduct, which is inefficient. Conservatives should hate it as much as Liberals. It is not a way to have a vibrant economy. So, I think that we have to be concerned more, in my opinion, with collusion.

Now, having said that, I think that frivolous suits are absolutely outrageous, not just in the class action area, but all over our judicial system. That is why I believe you should not have let Rule 11 be gutted the way it was.

Mr. COBLE. Thank you for your terse response, professor.

Mr. DELAHUNT. Mr. Chairman.

Mr. COBLE. Yes, sir.

Mr. DELAHUNT. I move unanimous consent that the chairman be allowed an additional 5 minutes.

Mr. COBLE. Well, I appreciate that. I will not do that, though. Thank you, Bill. Let me put this question to the three male members, starting with Mr. Thornburgh.

Is the purpose, gentlemen, of class action litigation to (a) promote collective social justice, or (b) to help aggrieved injured parties? Dick, why do you not start with that.

Mr. THORNBURGH. I think, Mr. Chairman, that indeed is the question. I would subscribe to the observation made by Judge Niemeyer who identifies the unresolved question: "Whether the class action rule is intended to be solely a procedural tool to aggregate claims for judicial efficiency, or whether it is intended to serve more substantively as a social tool to enforce laws through attorneys acting de facto as private attorneys general."

I would personally identify myself with the views of Mr. Frank in that these kinds of pursuits are more appropriately allocated to the Congress and to the Federal regulatory agencies than being sought through contortions in our civil justice process.

Mr. COBLE. Judge, let me hear from you on that.

Mr. SCIRICA. Mr. Chairman, I think you certainly have identified one of the key problems in this area. Even though Rule 23 was created by the Judiciary, the attempts to amend it have certainly taken on a substantive aspect.

The Rules Committee has been very conscious of our role under the Rules Enabling Act in dealing only with procedural rules and, of course, Congress' role in passing substantive law.

The line between procedural and substantive law is often difficult to draw. It appears that in this area, Rule 23 is one of those that at least straddles the line between procedural and substantive law.

I think most of us on the Advisory Committee think that this issue is also one for Congress. That if a procedural rule does have such an enormous substantive affect, that perhaps the Congress ought to be looking at it, as well as the Judiciary.

Mr. COBLE. Mr. Frank, do you want to insert your oars into these waters?

Mr. FRANK. I am going to use that, if I may, Mr. Chairman, as a permission to comment briefly on two observations by Professor Koniak, with which I differ. May I do that?

Mr. COBLE. You may, indeed.

Mr. FRANK. First of all——

Mr. COBLE. Mr. Frank, if you could, fairly tersely and move it along because we are running close to time.

Mr. FRANK. Two minutes, I think, will do it.

Professor Koniak, with whom I generally agree, has managed to get us into the Rule 11 controversy. I am a member of the bar nationally most responsible for the changes in Rule 11, which I warmly endorsed. I believe that her concerns are excessive.

The more serious point is this. At one time or another, I have appeared before you as a representative for the litigation section of the ABA. I have appeared before you as a representative on behalf of the plaintiffs' bar, and I have appeared before you on other matters directly authorized as a representative of all 50 State bars.

In the discussion of the class action subject, in terms of maladictions addressed to the plaintiffs' bar, is really way excessive. I am not a part of it, by the way. The most visible aspect of misfortune in the class action field is the race by attorneys to grab the cases.

The ashes from the great fire will not be cold and the corpses barely in the mortuary before someone will have filed a class action. From thereon the case has churned to warrant more fees.

These persons are known as the parachutists. They are a small segment of the plaintiffs' bar; I have, and I wish this to be in the record, I have consulted four past-presidents of the American Trial Lawyers' Association, which is the number one group of plaintiffs' lawyers.

They are unanimous that these undesirable practices exist and that it is disgusting. This historical development, they believe, brings shame to the bar and particularly to their great division of it.

So, I simply call to your attention that the loose talk about the plaintiffs' bar is an severe injustice to the 98-percent or 99-percent of the plaintiffs' bar, again, of which I am not a member, which likes these practices no better than Mr. Thornburgh, or I, or for that matter, Professor Koniak.

We are dealing with a very small subset of a special group which has managed to milk the cow in this exorbitant fashion. They should be focused on as such. The general statements about the plaintiffs' bar are unjust to that group. Thank you.

Mr. COBLE. Thank you, Mr. Frank.

The Gentleman from Michigan.

Mr. CONYERS. Thank you, Mr. Chairman.

This is a distinguished panel. Judge Scirica, are you the son of the late Judge Scirica?

Mr. SCIRICA. No. I am not, nor am I related, although my father was a State court judge in Pennsylvania. So, I frequently get asked that question.

Mr. CONYERS. I am sure.

We are, of course, pleased to have the former Attorney General here. We are working on a number of matters that relate back to your tenure when Bill Gray was the subject of leaks.

As Attorney General you were, I must say it is recalled, very forthright in trying to address that problem. I just want to commend you on the record, now that we are in the same room again that we had been many years ago.

Gentlemen, is the problem that we are dealing with in terms of class action abuses, is it two-sided? The professor has mentioned that there would probably be defense counsel corporate abuses.

Is it correct for us to infer here that most of the concerns that are brought to the subcommittee deal with the plaintiffs side and the lawyers there, or are we prepared to assert that this is a problem that affects the entire bar, or one side more than the other?

Can I get some kind of appreciation of how you feel about that? What do you think, Mr. Frank?

Mr. FRANK. I think the obnoxiousness is even. Mr. Conyers, what happens is this. The defendant corporation sees a chance to buy res judicata. That is really what it comes to.

It is getting out of any further obligations by barring any further claims. When it does that, it is paying some money. It does not care how much money it pays to the plaintiffs' lawyer, as distinguished, so the plaintiffs, because the only thing of concern to it is the bulk dollars which are going to pass through.

So, to put it bluntly, what happens in some of these cases is that the defendants bribe plaintiffs' counsel with large fees to ditch the class.

On the other hand, this is a matter in which both sides, i.e., the plaintiffs' attorney and the defendants have an interest in getting rid of the matter; the plaintiffs' attorney to make as much as possible, the defendants' attorney to buy res judicata.

Mr. CONYERS. Of course, the judge does not mind getting rid of a tough case sometimes either.

Mr. FRANK. Forgive me, sir, but I did not understand that.

Mr. CONYERS. I said, and of course sometimes the judge does not mind getting rid of a tough case.

Mr. FRANK. The desire to push along to get to the next matter on the docket, as has been brought up by other members of the panel, becomes a motive power which permits this system to exist.

Mr. CONYERS. Thank you very much.

Judge Scirica, we have a Judicial Reform Act, a bill coming forward next Tuesday in this committee before the full committee. It has come from the subcommittee.

It has a section in there that deals with class actions. It essentially provides that interlocutory appeals can be taken for certification to dissuade attorneys from bringing unwarranted class action suits. This seems to be an appropriate subject to raise with you here.

This is a matter now in the Advisory Committee that you chair. Would we be as well served to at least delay this provision until we have heard from the judges who are on the firing line and are probably more fully prepared to address this question than we are?

At least to find out what you are going to tell us about it before we dispose of the matter. By the way, the Department of Justice has urged, in effect, about the same thing.

Mr. SCIRICA. Yes, Mr. Conyers.

As I related earlier, the Judicial Conference has already approved, as a rules change, the interlocutory appeal. I am not sure that it exactly mirrors your statute, but I think it is quite close.

If the Supreme Court does adopt it, which we hope it will, it will come to Congress by May 1st. It would be our hope that you would look at our proposal to see whether it meets your standards.

We would be happy to provide you any of the background information that we have collected in coming up with this rule. If you think that it is appropriate, you simply may want to accelerate its adoption, if the Supreme Court decides to adopt it. We would be happy to work with you, sir, and the committee on this.

Mr. CONYERS. Well, that is very helpful. I would like to talk with Chairman Coble and Chairman Canady, out of whose committee this measure is coming. Actually, the dates are fairly close together.

It just seems more appropriate that we stop, pause, and see what you are doing and thinking. I hope that you are right; that we are going in the same direction. I hope that subcommittee Chairman Canady agrees to something like this. He is with us this morning.

Well, thank you very much, Mr. Chairman.

Mr. COBLE. Thank you, Mr. Conyers. The Gentleman from Florida, Mr. Canady.

Mr. CANADY. Thank you, Mr. Chairman.

I will follow-up on that line of questioning. Just to make the point that I believe that we have in the bill that we are moving

forward is virtually identical to what has come out of the committee.

So, I do not think there is any substantive disagreement about the approach to take. There is perhaps a procedural conflict about whether the Congress should insert itself into this, or whether it should be dealt with through the process established under the Rules Enabling Act.

The only point I will make is that Congress passed the Rules Enabling Act. I certainly believe that we have the authority to act on this. I just want to make sure that it gets done. Quite frankly, I had hoped that we would be able to move this legislation before now. Having acted on it sooner would have helped solve the problem.

Now, it looks like if it passes, it will go into effect probably, given the way this legislative process moves here, not much sooner than the rule would in the ordinary course, if Congress takes no action. I just wanted to make that point.

I will point out that we have consulted with Judge Niemeyer at a meeting with him and discussed this issue at some length. So, I think we are really on the same wave length substantively, or there may be a difference on who should be doing what.

Let me move on from that and touch on a couple of points. First, I would like to ask if anyone on the panel would like to specifically respond to Representative Moran's proposal to make it easier for class action lawsuits to be brought in Federal court.

If I understood what he was saying, he thinks there is a problem because certain class action lawsuits are brought in State court and there are greater abuses there. If they were brought in Federal court, the abuses would be less.

I would be interested in the reactions of anyone on the panel who would like to react.

Mr. SCIRICA. Well, let me briefly say that the Judicial Conference has supported, in principle, the creation of Federal jurisdiction that would rely on minimal diversity jurisdiction to consolidate multiple litigation in State and Federal courts, in cases involving personal injury or property damage arising out of a single event. Of course, the particulars would have to be worked out by Congress.

Mr. CANADY. Okay. Anyone else? Professor.

Ms. KONIAK. Yes. I think it is a good idea. There is the Polybutylene Pipe case, which is one of the biggest class actions. It was in Union City, Tennessee, in a State court in a city no one could get to easily. You could not fly in to object without great expense.

Often, these courts are picked—courts in the middle of nowhere. The absent class is thus effectively denied access to the documents, and the proceedings. I do not think jurisdictional changes are a full answer, but I think it should be done.

Mr. CANADY. Okay. Mr. Thornburgh.

Mr. THORNBURGH. I just want to add my own observation on that. I think there are two aspects of this question that deserve some consideration.

One relates to the fact that most businesses in today's age are multi-jurisdictional in nature. They may have a headquarters in one State, a manufacturing establishment in another State. They

may sell products into a third State that are used in an infinite number of other States.

So, the burden that is imposed on an interstate commerce and on economic growth by this crazy guilt "patchwork" of laws on both substantive and procedures scores really works a retarding influence on sustaining our economy.

Anything that promotes uniformity in that respect, as was suggested, for example in the product liability bill which was passed by the Congress, but vetoed by the President, or the securities reform litigation, which was passed by the Congress, vetoed by the President, and overridden and is now a part of our law, I think is a positive thing from the point of view of the economy.

The other aspect I think that deserves some consideration is the fact that not only are the State laws different, but State courts vary substantially in their quality and approach.

Most of the complaints that arise out of alleged inequitable treatment in these suits in State courts are in States where the judges are elected and must, per force, depend upon contributions which come from potential party litigants.

I think the record is replete that those abuses really give rise to a skewing of the purpose of litigation. Particularly when the dollars involved are big and the number of people affected are great.

I might just add one thing in response to Chairman Conyers, if you will permit me. I did not speak to the issue that you raised. It seems to me that when you are talking about whether we are focusing on plaintiffs' lawyers, or defense lawyers, or plaintiffs and defendants, or the courts there is a very central rule that can be applied. Up the street is a building that has inscribed on its facade the aspiration of "Equal Justice under Law."

Equal justice, to be sure, is due every one of our citizens, but it must be under law. I think that if it is sought in trying to strike a balance in this area, as in many others relating to litigation, the country will be well-served by your efforts in this regard.

Mr. FRANK. May I add for a complete concurrence?

The two key things, to reduce it to two sentences: If you really want to do something constructive about this, then you want the lead items.

Number one, is to accept the opt-in instead of the opt-out device in class actions which would become a major control. In other words, people, if they are to be involved in lawsuits, would have to express the wish to be involved in lawsuits.

Number two, that you adopt the suggestion just made about State and Federal courts. Those two by themselves are perfectly simple things to do and would be an immense improvement. Thank you.

Mr. CANADY. Thank you very much.

Thank you, Mr. Chairman.

Mr. COBLE. Thank you, Mr. Canady. The Gentleman from Massachusetts, Mr. Delahunt.

Mr. DELAHUNT. Thank you, Mr. Chairman.

This has been a very informative panel. It would appear that the problems come from two different perspectives. Professor Koniak, you talked about frivolous suits prompted by, it would appear from

the testimony of other members of the panel, particularly Mr. Thornburgh, by the plaintiff bar and disproportionate fees.

On the other side, the problem of so-called collusive suits whereby plaintiffs and legitimately aggrieved parties are not being treated fairly.

Then we have, in terms of remedies, the issue of whether Congressional action is appropriate, is necessary, is required, or rather is there a role for the courts here in amending their own rules?

As I begin to reflect and listen to your testimony, I find a fundamental issue to be the substantive versus procedural one. I guess I fall more on the substantive side, Mr. Frank.

Again, I do not want to get into the whole tobacco settlement. The reality is that the United States Congress for years had hearings, but took no action substantively on the issue of tobacco.

If we did not have State Attorneys General, or if we did not have available to us a class action remedy, what would have happened? I dare say, not a damn thing. So, I guess there is a legitimate role, Mr. Frank, at least from my perspective, that the class action issue can be properly perceived and be understood as having tremendous validity, substantively, when there is either impasse, or lack of political will at the Congressional level, to do something I would suggest is positive.

Some might suggest that would lead to judicial activism. In any event, those are my own observations. I would ask the question of Mr. Thornburgh. I take it that your clientele is mostly a corporate client base.

Mr. THORNBURGH. Yes. My interest in this really goes back to the time that I served in government. I do not have any particular client interests in today's proceedings.

Mr. DELAHUNT. I do not mean in any way to suggest.

Your testimony did refer to exorbitant fees that were being received by the plaintiff bar.

Mr. THORNBURGH. Yes. I have two interests. I tried to make that clear. One is in seeing that plaintiffs get a fair shake and that their interest are not clouded or preempted by the ill-gotten gains of their lawyers. I say that with due deliberation.

Mr. DELAHUNT. Right.

Mr. THORNBURGH. The second concern I have is, and this goes far beyond the scope of this hearing, but the deleterious effect on our prospects for economic growth, and particularly for continued innovation on cutting edge technologies being adversely affected by the overhang of these kinds of abuses.

Mr. DELAHUNT. And you see that as a real impediment within the market place today.

Mr. THORNBURGH. Every study that has been done I think bears that out.

Mr. DELAHUNT. Thank you. I would like to see some of those studies because clearly much of what everyone relate today is anecdotal in nature.

I would like to think that we are going to craft policy, if we do anything, based on some data and empirical study.

Mr. THORNBURGH. You will not be surprised to know that I have a speech that I can send to you in that regard.

Mr. DELAHUNT. I will be eagerly awaiting it.

[The speech referred to follows:]

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AMERICA'S CIVIL JUSTICE DILEMMA: THE PROSPECTS FOR REFORM

DICK THORNBURGH

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AMERICA'S CIVIL JUSTICE DILEMMA: THE PROSPECTS FOR REFORM

DICK THORNBURGH*

INTRODUCTION

Despite Judge Learned Hand's oft-quoted observation that "litigation is to be dreaded beyond almost anything short of sickness or death," the United States has become the most litigious society on earth.[1] Our society seems to seek a virtual risk-free environment and when anything goes wrong, the first question commonly asked is "whom do I sue?" Our courts are clogged. Litigation has become increasingly complicated, expensive, and lengthy. Public dissatisfaction with lawyers and our justice system is widespread. While we have not quite reached the stage at which a Shakespearean call to "kill all the lawyers"[2] is forthcoming, the signs across our society are ominous.

Consider our civil justice system. Tort law in the United States has created what amounts to a liability tax.[3] This tax, deriving from tort liability, is imposed on all providers of goods and services and is part of the cost of almost everything we buy.[4] It directly costs American individuals, businesses, and municipal governments $150 billion

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1. In 1989 nearly 18 million new civil suits were filed in American courts—one lawsuit for every 10 adults. PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA (1991) [hereinafter PRESIDENT'S COUNCIL ON COMPETITIVENESS].

There are 70,000 product liability suits pending annually in the United States, compared with only 200 in the United Kingdom. KIRKLAND & ELLIS, THE NEGATIVE IMPACT OF PRODUCT LIABILITY ON U.S. COMPETITIVENESS: LIABILITY LAW REFORM REINFORCED BY NEW STUDIES 12 (Washington Legal Foundation, Critical Legal Issues: Working Paper Series No. 43, Oct. 1990) (citing Gary T. Schwartz, *Medical Malpractice and Products Liability: A Comparative Legal Assessment* 39-40 (1990) (Brookings Institution Symposium)).

The United States has 30 times more lawsuits per person than Japan. *America's Legal Mess*, U.S. NEWS & WORLD REP., Aug. 19, 1991, at 72.

2. WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE SIXTH, act 4, sc. 2.

3. Peter W. Huber, *Flypaper Contracts and the Genesis of Modern Tort*, 10 CARDOZO L. REV. 2263, 2263-65 (1989).

4. Part of the tort tax is also paid through the reduced availability of goods and services. *To Reform the Federal Civil Justice System, To Reform Product Liability Law: Hearing on H.R. 10 Before the House Comm. on the Judiciary*, 104th Cong., 1st Sess. 100 (1995) [hereinafter

per year.[5] The tax is collected through litigation.[6] It represents as much as thirty percent of the price of a stepladder,[7] over ninety-five percent of the cost of childhood vaccines,[8] one-quarter of the price of a ride on a Long Island tour bus,[9] one-third the cost of a small airplane,[10] and actually exceeds the cost of making a football helmet.[11] Potential tort liability has temporarily closed the "Cyclone" at the Coney Island Amusement Park, several public beaches, and a number of ice-skating rinks.[12] It has curtailed Little League games,[13] fireworks displays, evening concerts, and sailboard races.[14] It will soon cost large municipal governments as much as they spend on sanitation or fire services.[15]

The focus of this Article is on common-sense reform of our civil justice system, an issue that has come to center stage both in Congress and in many state legislatures. The public has expressed concern and outrage over excessive verdicts such as the infamous $2.7 million verdict against McDonald's for serving dangerously hot coffee,[16] and the $4 million punitive award tacked on to a $4000 verdict for an undisclosed touch-up paint job on an Alabama BMW.[17] Ideals such as pro-

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Hearing on H.R. 10] (statement of Patrick J. Head, Vice President and General Counsel, FMC Corporation).

5. ROBERT W. STURGIS, TORT COST TRENDS: AN INTERNATIONAL PERSPECTIVE (1995).

6. Huber, *supra* note 3, at 2264.

7. PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 3 (1989).

8. "[I]n 1982, the private sector cost of immunizations for a two-year-old was $20.17. Ten years later . . . the cost of a complete regimen of vaccinations has risen to $188.19, with the federal liability tax constituting 12.5% of that price." *The Vaccine Outlook*, WALL ST. J., Feb. 23, 1993, at A20 (editorial).

9. Huber, *supra* note 3, at 3 (citing Robert Hanley, *Insurance Costs Imperil Recreation Industry*, N.Y. TIMES, May 12, 1986, at A1).

10. *Id.* (citing *General Aviation Tort Reform Considered*, THE EXECUTIVE LETTER, Ins. Info. Inst., Aug. 18, 1986, at 1).

11. *Id.*

12. *Id.*

13. *See generally* U.S. Rep. John E. Porter, *Volunteer Immunity: Prodding the States*, *in* STATE CIVIL JUSTICE REFORM, 63, 64 (Roger Clegg ed., 1994) (discussing a suit that eventually settled for $125,000 filed against volunteer Little League coaches after a player was injured by a fly ball hit into the outfield).

14. Huber, *supra* note 3, at 4.

15. *Id.*

16. The total damages were later reduced to $640,000. Benjamin Weiser, *Tort Reform's Promise, Peril: Legislation Could Mean Tight Limits on Liability*, WASH. POST, Sept. 14, 1995, at A1. The punitive damages awarded represented $400,000 of the total. *Id.*

17. BMW of N. Am., Inc. v. Gore, 646 So. 2d 619 (Ala. 1994), *rev'd*, 116 S. Ct. 1589 (1996). The punitive award was later cut in half by the state supreme court. *Id.* The United States Supreme Court overturned the award as grossly excessive in violation of due process. *Gore*, 116 S. Ct. at 1604.

portionality and justice have been replaced by what amounts to a legal lottery.

Many Americans appear to think that issues of civil justice reform are only for the judges, the lawyers, and the academics. Ordinary citizens find it difficult to relate controversy over legal principles and concepts to their everyday lives. I want to suggest, however, that fundamental principles of this debate are found in three basic areas: enhancing our economic competitiveness and ensuring job security; preserving our health care system and the viability of medical research; and guaranteeing to all citizens their right to a day in court. All of these interests are adversely affected by the present shortcomings in our civil justice system.

This Article will lay out some specific areas where I think reform in our civil justice system is necessary to protect these interests. Part I targets the problems, including the burdens on American competitiveness, the domestic health care system and litigants' rights. Part II focuses on solutions.[18]

I. THE PROBLEMS

More than any other area of law, tort liability reflects society's prevalent moral, technological, ideological, and economic conditions.[19] Because there are financial, cultural, and justice interests in conflict, tort law is highly vulnerable and responsive to change.[20] First, the substantial financial interests of both business and trial lawyers are placed at the fore the moment one begins to talk about reform of the legal system. Second, cultural issues are presented: our quest for a risk-free society and the emergence of the so-called victim syndrome. Finally, tort law must serve the underlying goal of the search for justice under the rule of law—the redress of wrongs must

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Another noteworthy case involves a Maine golfer who accidentally hit herself in the face with her own golf ball. The ball ricocheted off railroad tracks on the golf course and hit her in the nose. She collected $40,000. *Hooking a Tort*, WALL ST. J., July 20, 1995, at A12 (editorial).

18. Most of these recommendations, not surprisingly, were framed and proposed by the Bush Administration while I served as Attorney General in the *Agenda for Civil Justice Reform in America*. PRESIDENT'S COUNCIL ON COMPETITIVENESS, *supra* note 1, *passim*. The Council report stated the following goals for civil justice reform: (1) swifter justice; (2) reduced costs of litigation; (3) greater choice in methods of resolving disputes; and (4) maintaining the integrity of the justice system. The House of Representatives passed many of these suggestions as part of the Republican "Contract with America," and some were approved in the Senate as well. All are based on common sense and deserve serious consideration. These goals will serve as a framework for Part II of this Article.

19. PETER H. SCHUCK, TORT LAW AND THE PUBLIC INTEREST 18 (1991).

20. *See id.*

continue to be a priority for our society. The ultimate goal is to resolve these seemingly conflicting interests. I focus first on the three specific problem areas mentioned and consider some ways in which we might address them.

A. Enhancing Our Economic Competitiveness

First, let us examine the primary thesis of the report prepared for the President's Council on Competitiveness.[21] The defects in our civil justice system have had a harmful effect on our economic competitiveness and, in turn, on our economic growth and our ability to create and retain jobs.[22] Litigation constitutes a hidden tax on the American economy. It not only increases costs to American consumers, but it impedes our international competitiveness.[23] A good example of this flaw in the tort system is product liability litigation.

1. Product Liability.—The civil justice system wreaks a self-inflicted competitive disadvantage on the American economy. According to a study by the Wharton School at the University of Pennsylvania, product liability litigation was estimated to add $1.6 billion annually to the cost of doing business in Pennsylvania alone.[24] In order to remain competitive, manufacturers need as much stability in their costs as possible—including predictable liability costs, something that is impossible under the current system.

The threat of liability coupled with the uncertainty of outcomes hurts U.S. industry and, consequently, U.S. consumers and the entire

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21. PRESIDENT'S COUNCIL ON COMPETITIVENESS, *supra* note 1, at 1-3.

22. Three prominent non-lawyers explore this theme in recent books about problems in the American economy. *See* PETER PETERSON, FACING UP 182 (1993) (observing that product liability is the area of the law that poses the greatest threat to American competitiveness and overall economic prosperity); EDWARD LUTTWAK, THE ENDANGERED AMERICAN DREAM 217-18 (1993) (noting that demonstrating compliance with regulations may cost more than actual compliance); MICHAEL PORTER, THE COMPETITIVE ADVANTAGE OF NATIONS 649 (1990) ("[P]roduct liability is so extreme and uncertain as to retard innovation. The legal and regulatory climate places firms in constant jeopardy of costly . . . product liability suits. The existing approach goes beyond any reasonable need to protect consumers, as other nations have demonstrated through more pragmatic approaches.").

23. *See* PETERSON, *supra* note 22, at 182.

24. PETER LINNEMAN & DANIEL INGBERMAN, PRODUCT LIABILITY LAW: THE ECONOMIC IMPACT ON PENNSYLVANIA 8-9 (1989). The American public pays the ultimate price. As one commentator asserted:

> In each manufacturing industry subjected to sustained courtroom assault—prescription drugs, vaccines, contraceptives, sporting equipment, small planes, small cars, insulation materials—products that represent a valuable choice over some of the remaining alternatives have either been driven off the market or not introduced for fear of liability, with increasingly tragic results for the public health.

WALTER K. OLSON, THE LITIGATION EXPLOSION 6-7 (1991).

economy. Consumers and businesses in this country spend $80 billion annually on litigation and liability insurance premiums.[25] A 1984 U.S. Department of Commerce study revealed that foreign competitors often face product liability insurance costs twenty to fifty times lower than those faced by U.S. companies.[26] The huge volume of litigation has added sizable costs to consumer goods.[27]

2. Innovation.—The indirect costs are inestimable. One survey of manufacturers and retail firms showed that forty-seven percent had discontinued products,[28] twenty-five percent had discontinued or curtailed research,[29] fifteen percent had laid off workers as a direct result of product liability experience,[30] and eight percent had closed plants based on actual or anticipated liability costs.[31] The threat of liability has significantly inhibited the product development and innovation[32] needed to provide improved services to consumers and to assure a leadership role for our economy worldwide.[33]

B. Health Care

A brief look at our health care system illustrates the necessity for reform. Here, the civil justice system plays a large role, specifically in the field of medical malpractice. The purpose of a medical liability system is to deter negligent practice.[34] The goal of the system should be to minimize the total social cost of medical injuries as defined by

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25. HUBER, *supra* note 7, at 4.

26. PRESIDENT'S COUNCIL ON COMPETITIVENESS, *supra* note 1, at 3.

27. For example, an automotive liability of over $6 billion per year is meted out as a 5% per car cost to American consumers. KIRKLAND & ELLIS, *supra* note 1, at 18 (citing Murray Mackay, *Liability, Safety and Innovation in the Automotive Industry* (1990) (Brookings Institution Symposium)).

28. PRESIDENT'S COUNCIL ON COMPETITIVENESS, *supra* note 1, at 3; *see also* Alfred W. Cortese, Jr. & Kathleen L. Blaner, *The Anti-Competitive Impact of U.S. Product Liability Laws: Are Foreign Businesses Beating Us at Our Own Game?*, 9 J.L. & COM. 167, 199-201 app. A (listing discontinued product lines).

29. *See* Cortese & Blaner, *supra* note 28, at 201-02 (listing examples).

30. PRESIDENT'S COUNCIL ON COMPETITIVENESS, *supra* note 1, at 3.

31. *Id.*; *see also* Cortese & Blaner, *supra* note 28, at 198 app. A (discussing WEPCO, Inc., a company that manufactured driving aids for the disabled, forced out of business because it could not obtain product liability insurance, even though it had never been sued and was certified by the Veteran's Administration).

32. For example, Monsanto did not market an already patented phosphate fiber asbestos substitute because of the liability risk. Cortese & Blaner, *supra* note 28, at 201.

33. A nation's economic growth is determined by the rate of growth of labor and capital, and the rate of technological advances and productivity improvement. Robert E. Litan, *The Liability Explosion and American Trade Performance: Myths and Realities*, *in* TORT LAW AND THE PUBLIC INTEREST, *supra* note 19, at 127, 148-49.

34. Patricia M. Danzon, *Malpractice Liability: Is the Grass on the Other Side Greener?*, *in* TORT LAW AND THE PUBLIC INTEREST, *supra* note 19, at 176, 177.

the actual costs of the injury, plus prevention and litigation.[35] Instead, it has raised insurance premiums and with them overall health care costs, forced many doctors to curtail their practices, and fostered more defensive medicine.[36]

1. Medical Malpractice.—In the late 1960s and early 1970s, the explosion of claims filed against physicians and the dramatic acceleration in the size of awards and settlements led most insurance carriers to curtail their medical liability coverage.[37] As it became too difficult to predict future claims and to calculate the premiums required, commercial carriers withdrew from the market.[38] Disruption of medical services became a real possibility in some states, as certain medical services became unavailable, particularly in rural counties.[39] Physicians, working with state medical societies, began to form their own medical liability insurance companies. These not-for-profit companies are now the major force in the medical malpractice insurance market, and cover more than half of the self-insured physicians in this country.[40]

As medical malpractice claims spiraled again in the 1980s, so too did liability insurance premiums.[41] Some physicians were paying hundreds of thousands of dollars a year for liability coverage. Annually, the estimated cost of liability insurance for doctors and health care facilities alone is over $9 billion.[42] This crisis compelled many of them to eliminate high-risk procedures and high-risk patients from

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35. *Id.*

36. High health care costs spill over into other industries. The Chrysler Corporation estimates that liability costs add $700 to the cost of each car to cover employee health care costs. That is double what French and German automakers pay and triple what Japanese producers must add. THE CONFERENCE BOARD, PRODUCT LIABILITY: EVOLUTION AND REFORM (June 1989).

37. Martin J. Hatlie et al., *Health Care Liability: Reform in a Changing Environment*, *in* STATE CIVIL JUSTICE REFORM, *supra* note 13, at 35, 44-45; *see also* Danzon, *supra* note 34, at 177.

38. Hatlie et al., *supra* note 37, at 45.

39. *Id.*

40. *Id.*

41. *Id.* During the period from 1975 to 1986, claim frequency per 100 physicians rose at an average rate of at least 10% per year, with a particularly sharp increase from 13.5 claims per 100 in 1982 to 17.2 per 100 in 1986. Danzon, *supra* note 34, at 179. The average amount paid per claim rose at twice the rate of the Consumer Price Index from 1975 to 1984. *Id.* From 1994 to 1995, there was a 40% increase in the median award in medical malpractice cases. Henry J. Reske, *Tort Awards Increasing*, 82 A.B.A. J. 26, 26 (May 1996). Over half of U.S. physicians now have at least $1 million in coverage. Danzon, *supra* note 34, at 180. More medical malpractice suits were filed in the decade ending in 1987 than in the entire previous history of American tort law. HUBER, *supra* note 7, at 9.

42. Hatlie et al., *supra* note 37, at 46.

their practice.[43] One result has been that in some states family physicians refuse to practice obstetrics.[44] Ultimately, the cost of these premiums gets passed on to the patients; for example, in Florida, $1119 goes to pay for liability insurance for each baby delivered.[45]

2. Defensive Medicine.—Defensive medicine is the label given to unnecessary or redundant medical procedures that are ordered out of fear of a malpractice claim. These practices add further costs to our health care bill. The unpredictability of both liability standards and the size of damage awards has created an incentive for physicians to overcompensate and contributes significantly to the rise in health care costs.[46] Defensive medicine had an estimated cost of $25 billion in the United States in 1991.[47] Seventy-eight percent of physicians confirm that the threat of liability leads them to order tests that they would otherwise consider unnecessary.[48] The specter of liability thus creates an enormous obstacle to affordable health care.

3. Product Liability.—Product liability concerns have forced the withdrawal of drugs and medical products from the market. The drug Bendectin, a morning sickness remedy, was pulled from the market because the annual $20 million in sales could not support the annual $18 million cost of litigation and insurance.[49] The pertussis, or whooping cough, vaccine was developed to prevent what had been the leading crippler and killer of children before its introduction in the 1940s. By 1985, seven of the eight manufacturers of the drug withdrew it from the market because of lawsuits.[50] A liability fund, financed by the increased cost of the vaccine, was finally established to prevent a shortage.[51] A similar climate of uncertainty has discouraged research for an AIDS vaccine as many companies have delayed or

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43. Danzon, *supra* note 34, at 194. A survey conducted in 1986, after the sharp premium increases of 1985, showed that about 20% of physicians reported that they had dropped high-risk procedures as a response to liability. *Id.*

44. Hatlie et al., *supra* note 37, at 46.

45. *Id.* at 45.

46. Danzon, *supra* note 34, at 196.

47. Hatlie et al., *supra* note 37, at 46 (citing LEWIN-VHI, ESTIMATING THE COSTS OF DEFENSIVE MEDICINE (Jan. 27, 1993)).

48. Danzon, *supra* note 34, at 46.

49. W. Kip Viscusi & Michael J. Moore, *Rationalizing the Relationship Between Product Liability and Innovation*, *in* TORT LAW AND THE PUBLIC INTEREST, *supra* note 19, at 105, 112. The truly astounding fact is that a product liability recovery was never successfully obtained from the manufacturer. *Id.*

50. Hatlie et al., *supra* note 37, at 47.

51. *Id.*

abandoned clinical trials of promising substances because of fear of liability.[52]

C. *Civil Justice—Litigants' Rights*

The rights of the litigants also must be recognized. Two problems—the time it takes to get a case to trial[53] and the relatively low percentage of the recovery that goes to the injured persons[54]—must be resolved. Victims, as well as defendants, have an interest in the predictability of compensation for their injuries. This element is lacking under the current system. No one can give victims any assurance as to whether they can get compensation, when it will be paid, or how much it will be.

The reforms suggested by the Competitiveness Council and in this Article are directed at fixing the process of resolving disputes, not altering the substantive rights of any person to assert any meritorious claim.[55] They are nearly all procedural in nature. These proposals are intended to open more doors for people to assert their rights by clearing the way for truly meritorious claims to have their day in court.[56]

II. THE SOLUTIONS

Having noted the problems that are present in the existing civil justice system, it is time to address the manner in which to deal with the shortcomings. Solutions are available, and some general areas in which reform should be considered are discussed below.

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52. *Id.*; *see also* Jon Cohen, *Is Liability Slowing AIDS Vaccines?*, SCIENCE, Apr. 10, 1992, at 168.

53. According to a study by the U.S. General Accounting Office (GAO), it takes the average product liability suit more than two and a half years to go from complaint to verdict and costs an average of $168,000. GENERAL ACCOUNTING OFFICE, PRODUCT LIABILITY: VERDICTS AND CASE RESOLUTION IN FIVE STATES (Sept. 1989).

54. KIRKLAND & ELLIS, *supra* note 1, at 14. The Commerce Department estimates that only 40 cents from each dollar expended in product liability suits reaches the victim. *Product Liability in America: Damage Limitation*, ECONOMIST, Dec. 2, 1989, at 84, 85. According to some estimates, as much as 70% of the product liability awards are consumed in the litigation process. KIRKLAND & ELLIS, *supra* note 1, at 15. This represents an annual multibillion dollar transfer of wealth to the legal profession. *Id.*

55. Dan Quayle, *Civil Justice Reform*, 41 AM. U. L. REV. 559, 560 (1992).

56. *Id.*

A. Product Liability

Common-sense solutions are available to address the problems presented by the product liability cases. It is my opinion that a uniform national system is the best way to solve all of these problems.

1. Federal Law.—National standards are essential to correcting the flaws in the existing system. A uniform federal law, deriving from the Commerce and Due Process Clauses of the Constitution, should replace the patchwork quilt of separate state laws. The operation of fifty laws in as many states is expensive and has led only to confusion. Tort law is fundamentally interstate in character, and thus the problem lends itself to a uniform national solution. On average, seventy percent of the goods manufactured in one state are shipped out of state and sold elsewhere.[57] If the injury then occurs in a third state, the issue can become further confused.[58] Businesses and manufacturers need the certainty and uniformity provided by a federal policy.[59]

A national law would not be contrary to the goal of systematically returning authority to the states. Instead, it reflects the truly interstate and international environment within which most competitive businesses operate today. A national law would help businesses to level the playing field with their foreign counterparts.

a. A Statute of Repose.—Because product liability insurance costs are markedly affected by the continued sale of older products,[60] such a national law should include a statute of repose. This provision would set a time period beyond which lawsuits could not be brought with respect to manufactured products and would create a uniform limitations period, setting a time after discovery of a defect in which a suit should be brought. An example of the problem is machine tools built decades ago but still in use today.[61] Built to the safety standards of their day, typically by now each tool has passed through several owners, each of whom has modified it to accommodate particular needs.[62] Product liability suits on this type of tool represent over one-

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57. *Hearing on H.R. 10, supra* note 4, at 1 (statement of Rep. Henry J. Hyde).

58. Even the most pro-defendant law enacted by a state would have limited effect on in-state companies because the law would help only if the manufacturer was sued in that state.

59. *Hearing on H.R. 10, supra* note 4, at 48 (statement of Charles E. Gilbert, Jr., President, Cincinnati Gilbert Machine Tool Co.).

60. *Id.*

61. *Id.*

62. *Id.*

half of the machine tool industry's lawsuits today.[63] Foreign machine tool builders do not face this long-term liability exposure and thus have lower costs.[64] A statute of repose would level the playing field in international markets for U.S. manufacturers.[65] Such a provision would reduce industry members' product liability costs by sixty percent.[66]

A national law should also provide a defense if regulatory standards have been met in the design and manufacture of a product,[67] and a defense if the product was manufactured in accordance with state-of-the-art technology at the time of manufacture.[68] A large inventory of old products is currently in use and a prospective defendant can do very little to minimize the loss from them.[69] Furthermore, many chemicals, drugs, and machine tools were originally sold years ago when the dominant product liability law limited the exposure of manufacturers and retailers. Tort reform must address the fact that these products have outlived the legal regime under which they were marketed.[70] Finally, the law should provide that the wholesaler or retailer should not be saddled with the same liability as manufacturers unless some kind of individual negligence is established on its part.

b. Joint and Several Liability.—Another area of tort law in need of reform is the concept of joint and several liability,[71] and the derivative "deep pockets" theory. Under joint and several liability the-

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63. *Id.* (citing ASSOCIATION FOR MFG. TECHNOLOGY, 20TH ANNUAL PRODUCT LIABILITY SURVEY 2 (1995)). While the manufacturers discussed in the testimony report that they almost always prevail in these suits, the litigation is lengthy and costly. *Id.*

64. *Id.* at 52.

65. *See id.* The European Economic Community Product Directive has a statute of repose of ten years. *Id.* at 100 (statement of Patrick J. Head). Fifteen years was the recommended interval in the House bill. *Id.*

66. *Id.* at 52 (statement of Charles E. Gilbert, Jr. (citing ASSOCIATION FOR MFG. TECHNOLOGY, *supra* note 63, at 1)).

67. Punitive damages should not be permitted in cases in which a product met stringent regulatory and testing guidelines such as those mandated by the Federal Aviation Administration and the Food and Drug Administration.

68. If a level of safety chosen is efficient, businesses should not have to act as insurers simply because they have deep pockets. Viscusi & Moore, *supra* note 49, at 105, 124. If insurance were the objective of the tort system without regard to some efficient level of safety, then automakers would have to reimburse all victims of car accidents regardless of causality. *Id.*

69. Richard A. Epstein, *The Unintended Revolution in Product Liability Law*, 10 CARDOZO L. REV. 2193, 2218 (1989).

70. *See generally* Gary T. Schwartz, *New Products, Old Products, Evolving Law, Retroactive Law*, 58 N.Y.U. L. REV. 796 (1983).

71. *See* RESTATEMENT (SECOND) OF TORTS § 875 (1977) ("Each of two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm.").

ories, if more than one defendant is named, even if their liability varies from one percent to ninety-five percent,[72] all are held accountable for the full 100 percent of the liability regardless of their degree of contribution to the harm.[73] Under a theory of joint liability, a defendant can be made to pay damages for injury caused by another party acting totally independently.[74] Sometimes the party most responsible for the harm is not even a party to the action. That party may be beyond the court's jurisdiction, may have already settled with the plaintiff, or may be bankrupt and unable to pay an award.

The deep pockets theory makes little sense.[75] Although forty-one states have abolished or limited this doctrine,[76] it enjoys wide application under federal law.[77] Apportionment of liability based on the injury caused by a particular defendant is much more equitable. Under the rule of individual liability, there would have to be a specific finding of the degree of contribution to the harm. Liability would go be-

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72. Twenty-five years ago, most juries were not permitted to return a verdict in favor of a plaintiff if he was in any way responsible for his injuries. In contrast, in some states today, a company found to be as little as 1% responsible for an accident may be held liable for some of the damages. Amy D. Marcus, *Plaintiffs Strike a Blow to Shift Blame for Accidents Caused by Their Own Acts*, WALL ST. J., Aug. 10, 1990, at B1.

73. *See* Walt Disney World v. Wood, 515 So. 2d 198, 199, 202 (Fla. 1987) (holding, under the doctrines of joint and several liability and comparative negligence, that the defendant was liable for 86% of the damages though only responsible for 1% of the fault).

Rising liability costs have made producing airplanes unprofitable. What is most striking is that faulty airplane designs were not the source of liability burden. Even though private error accounts for 85% of all accidents, the manufacturers of the aircraft are sued in 90% of all crash cases. W. Kip Viscusi, *A Principled Basis for Product Liability Reform*, J. REG. & SOC. COSTS (Nov. 1991). Two general aviation manufacturers slashed their output by between 88% and 98% while their product liability costs rose from $24 million in 1977 to $200 million in 1985. Stacy Shapiro, *Tort Costs Hurt Aircraft Manufacturers*, BUS. INS., June 10, 1991.

74. *See* Peter Van de Putte, *A Red, White and Blue Mess*, WALL ST. J., Apr. 27, 1995, at A14 (discussing his flag company's liability for an individual's injury caused by a flag manufactured and sold by another company).

75. *But see* John H. Wigmore, *Joint-Tortfeasors and Severance of Damages: Making the Innocent Party Suffer Without Redress*, 17 ILL. L. REV. 458 (1923) (arguing for the relaxation of rules that limit joint liability so that plaintiffs can have access to a broader range of pockets).

76. *See* Martha Middleton, *A Changing Landscape: As Congress Struggles to Rewrite the Nation's Tort Laws, the States Already May Have Done the Job*, 81 A.B.A. J. 56, 60 (Aug. 1995) (citing data compiled by the American Tort Reform Association; *see, e.g.*, COLO. REV. STAT. ANN. § 13-21-111.5 (West 1989 & Supp. 1995).

77. *See, e.g.*, Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 270-71 (1979) (holding that no proportionate-fault rule exists in maritime law); United States v. Monsanto Co., 858 F.2d 160, 171 (4th Cir. 1988) (holding that joint and several liability exists under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA)), *cert. denied*, 490 U.S. 1106 (1989); Watts v. Laurent, 774 F.2d 168, 180 (7th Cir. 1985) (holding that under 42 U.S.C. § 1983 independent actors may individually be held liable for indivisible harm), *cert. denied*, 475 U.S. 1085 (1986).

yond the degree of contribution only when insolvency of one tortfeasor prevents recovery and the balance can be proportionately shared.

2. Punitive Damages.—A main goal of a national tort reform law would be to restrain runaway punitive damage awards.[78] Punitive damages, now almost routinely claimed in tort litigation,[79] are considered punishment and not something to which plaintiffs have a right.[80] Plaintiffs are entitled to be compensated for what they have lost, including both economic and noneconomic losses. Today, the incentive to file frivolous lawsuits is increased by the prospect of a sizable punitive damage award.[81] Even trivial cases with nominal actual damages become difficult to resolve out of court because the plaintiff has no incentive to settle merely for actual damages.[82]

Limits must be placed on punitive damages to prevent the runaway jury verdicts that have recently plagued our system.[83] There is little direct or statistical evidence that specific liability verdicts have led to the development and introduction of substantially safer products.[84] Factors outside of the tort system, such as government regulation and the reputational concern of producers and providers of goods and services, have had a far greater impact on promoting safety.[85] The American College of Trial Lawyers and the American Law Institute, two of the most prestigious groups in the legal profession, have recommended a limit on punitive damages that reflects

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78. In 1987 the Institute for Civil Justice reported, after examining 24,000 jury trials in Cook County, Illinois, that the average punitive damage award increased, in inflation-adjusted dollars, from $43,000 to $729,999 for the periods 1965–69 to 1980–84. This is a real increase of 1500%. The rise has been even greater in personal injury cases. *See* PRESIDENT'S COUNCIL ON COMPETITIVENESS, *supra* note 1, at 6. In California, the average punitive damages award increased from under $1 million in 1986 to $6.6 million in 1994. Janet Novak, *Torture by Court*, FORBES, Nov. 6, 1995, at 198.

79. *Hearing on H.R. 10*, *supra* note 4, at 64 (statement of Richard K. Willard). Mr. Willard added, not totally facetiously, that it would "be almost malpractice for a plaintiff's lawyer not to include such a claim." *Id.*

80. *See generally* Victor E. Schwartz & Mark A. Behrens, *Punitive Damages Reform—State Legislatures Can and Should Meet the Challenge Issued by the Supreme Court of the United States in* Haslip, 42 AM. U. L. REV. 1365, 1368-70 (1993).

Furthermore, defendants in tort suits face the possibility of being punished repeatedly by different plaintiffs seeking damages for what might have been the same transgression. Middleton, *supra* note 76, at 61.

81. *Hearing on H.R. 10*, *supra* note 4, at 64 (statement of Richard K. Willard).

82. *Id.* Nor does the plaintiff's lawyer who is often working on a contingent fee basis.

83. *See supra* notes 16-17 and accompanying text.

84. THE BROOKINGS NEWS (The Brookings Institution, Washington, D.C.), June 13, 1991.

85. *Id.*

some multiple of the amount of compensatory damages awarded.[86] Punitive awards would then be a mathematically derived number or a predetermined sum, whichever is greater.[87]

Punitive damages are quasi-criminal in nature, intended to deter particularly egregious conduct.[88] Therefore, the standard of conduct for an award of punitive damages should be greater than negligence, closer to intentionally malicious or, indeed, criminal conduct. The burden of proof should provide for clear and convincing evidence of the wrongdoing, not merely a preponderance of the evidence.

3. Eliminate Frivolous Lawsuits.—Finally, some inhibition must be placed on the filing of frivolous lawsuits. In addition to limiting the availability of excessive punitive damages, another way to limit frivolous suits would be the adoption of some form of the "loser-pays" or "English Rule."[89] Account must be taken of the crushing burden that is often imposed on individuals and businesses by the legal fees they expend in defense of even groundless suits.[90] Limitations should be built in to ensure equal access to the courts and at the same time encourage pretrial settlements by imposing a market restraint on the litigation process.[91]

In addition, Rule 11 of the Federal Rules of Civil Procedure must be amended to provide even stiffer sanctions against attorneys who

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86. *See generally* Victor E. Schwartz & Mark A. Behrens, Haslip *May Alter Tort Claim Strategies*, NAT'L L.J., Feb. 17, 1992, at 23.

87. The provisions pertaining to a cap on punitive damages in no way affect the amount of economic damages that a plaintiff can receive. *See generally Hearing on H.R. 10*, *supra* note 4, at 66 (statement of Richard K. Willard) (discussing the proposed punitive damages cap in H.R. 10).

88. As the New York Court of Appeals stated:

> [A]n award of damages to a person injured by the negligence of another is to compensate the victim, not to punish the wrongdoer. . . . [T]he temptation to achieve a balance between injury and damages has nothing to do with meaningful compensation for the victim. Instead, the temptation is rooted in desire to punish the defendant . . . [and] has no place in the law of civil damages . . . .

McDougald v. Garber, 536 N.E.2d 372, 374-75 (N.Y. 1989) (citations omitted).

89. The term "English Rule" is a misnomer—it is in fact the "everywhere but in America rule." *See* Kenneth W. Starr, *The Shifting Panorama of Attorneys' Fees Awards: The Expansion of Fee Recoveries in Federal Court*, 28 S. TEX. L. REV. 189, 189 (1986). The American Rule is a "misfit" among most other nations' approaches to attorneys' fee awards. *Id.*

90. *See supra* note 49 and accompanying text. As one article noted:

> There were at least 4 claims of $5 million filed in the Tylenol matter, and at least one claim has already been filed against Sudafed. There is no negligence and no blame in either case, and nothing the manufacturers could reasonably have done to prevent the incidents. The only effect of such litigation is to raise the price paid by consumers for over-the-counter medication.

Paul H. Rubin, *Sudafed's the Last Thing to Be Afraid of*, WALL ST. J., Mar. 13, 1991, at A14.

91. PRESIDENT'S COUNCIL ON COMPETITIVENESS, *supra* note 1, at 9.

file frivolous lawsuits.[92] This would be a very effective way to curb lawsuit abuse.[93]

B. Medical Malpractice

Medical malpractice is the second major health care area that I have identified as a concern. The model for reform proposals in the Bush Administration was California's Medical Injury Compensation Reform Act (MICRA),[94] which has four very attractive features. First, it controls the "lottery" aspect of medical liability while ensuring all actual losses will be fully and adequately compensated.[95] While patients can still recover 100% of their out-of-pocket expenses relating to medical negligence, there is a $250,000 cap placed on noneconomic damages.[96] Second, MICRA contains a limitation on attorneys' fees, ensuring that patients, not their attorneys, will receive the lion's share of any award.[97] Third, it includes a provision requiring the jury to be notified of any other source from which the plaintiff has received recovery for economic losses, thereby preventing double recovery.[98] Finally, under MICRA, funds are provided for periodic payments of future damages in excess of $50,000—representing either income or medical treatment that may be required at some point in the future.[99] Under MICRA, physician malpractice payments have gone from the highest in the world to one-third to one-half of those paid by physicians in other states.[100]

In response to the high added costs of defensive medicine, it would be wise to consider a feature that exists in Maine, and that was

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92. Many of the vital safeguards that Rule 11 once provided were stripped away by the 1993 revisions. Debra T. Ballen, *Congress Off to a Good Start on Tort Reform*, NAT'L UNDERWRITER, Feb. 20, 1995, at 150; *see also* FED. R. CIV. P. 11.

93. *See* Ballen, *supra* note 92, at 15.

94. 1975 Cal. Stat. 3949. In 1975, facing the highest malpractice insurance premiums in the world, the California legislature passed relief in the form of MICRA. Hatlie et al., *supra* note 37, at 52-53.

95. Hatlie et al., *supra* note 37, at 53. While in practice the MICRA limitations only affect about 2% of the cases, the effect of screening out the lottery-type awards saves an enormous amount of money. *Id.*

96. *Id.* The $250,000 ceiling is still much more than any other country in the world allows. *Id.*

97. *Id.* Attorneys are encouraged to settle cases more quickly because they will not benefit financially from lengthy litigation, and they cannot hope for a big lottery-type award. *Id.* at 53-54.

98. *Id.* at 53. Such sources include workers' compensation, disability, and health insurance. *Id.*

99. *Id.*

100. *Id.* at 54. An obstetrician in California may pay $40,000 in annual premiums while an obstetrician in Florida pays $152,000 and in New York pays $94,000. *Id.*

included in President Clinton's original health care reform plan. This feature allows physicians to defend medical malpractice liability claims on the grounds that their professional conduct or treatment complied with approved practice guidelines. The Maine Medical Liability Demonstration Project[101] provides practice guidelines that specify recommendations for treatment with regard to diagnoses and procedures.[102] The guidelines, when accompanied by corroborating expert testimony, can be offered in court as evidence of acceptable care.[103] The goal is to eliminate the need to litigate the standard of care.[104]

Maine officials expect the program to decrease physicians' motivation to perform unnecessary diagnostic tests and treatment procedures that lead to increased health care costs.[105] The majority of eligible physicians in Maine have chosen to participate in the project.[106] This program should reduce the number of in-court swearing contests between experts that result from current procedures, and focus instead upon the best practices that are acknowledged within the medical profession.

C. *Reforming the Process*

1. Case Management.—Streamlining and acceleration of litigation in both the federal and state courts are key to this aspect of reform. Over ninety percent of all lawsuits are settled. The real question is, when do they settle? If they settle on the courthouse steps just before the trial starts, the system has consumed an excessive amount of time, labor, and resources to reach a result that could have been accomplished much sooner.[107] Reform measures could look to the rigorous case-management techniques employed by judges in the Eastern District of Virginia and their "rocket-docket" approach that moves cases along at a very rapid rate and tolerates little delay.[108]

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101. ME. REV. STAT. ANN. tit. 24, §§ 2971–2979 (West Supp. 1995).

102. *Id.*; *see also* Rebecca R. Gschwend, *Medical Specialty Societies and the Development of Practice Policies*, QUALITY REV. BULL. (Feb. 1990).

103. *See id.*

104. GOVERNMENT ACCOUNTING OFFICE, MEDICAL MALPRACTICE: MAINE'S USE OF PRACTICE GUIDELINES TO REDUCE COSTS, HRD-94-8 (Oct. 25, 1993).

105. *Id.*

106. *Id.*

107. Judges actually intervene in a large number of civil cases. In a 1980 nationwide survey of trial judges, over 75% characterized their role as "interventionist" at settlement conferences. Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1342 (1994).

108. *See* Loren Lieve, *Discovery Reform: Maybe the Best Solution Is No Discovery at All*, 77 A.B.A. J. 79, 86 (1991).

2. Discovery Reform.—Over eighty percent of the cost of an average civil lawsuit consists of pretrial investigation of facts through the discovery process.[109] The life of the average civil lawsuit in federal court is fourteen months.[110] In 1988 seventy-seven percent of litigators surveyed admitted to having used discovery against their opponents as an economic weapon.[111]

Pretrial depositions, interrogatories, and document demands can consume considerable time and money. The cost of responding to document demands can be astounding—employees must produce documents, attorneys must review them, and then the documents must all be copied and recorded.[112] Compelling an early exchange of core documents[113] may enable us to cut down on the amount of time that is spent "fencing" in pretrial maneuvers. Such early mandatory dialogue would eliminate needless filings and delays in the exchange of basic information and reduce both the gamesmanship and the expense.[114]

The 1993 amendments to the Federal Rules of Civil Procedure, requiring prediscovery disclosure of relevant information without waiting for a request from opposing counsel,[115] were a step in the right direction. The new procedures have had little practical impact, however, given that the rules allow district courts to opt out of the new discovery provisions by local rule or court order, or to modify the requirements.[116] So far, approximately half of the federal districts have rejected or modified the mandatory disclosure rules.[117] This lack of uniformity among federal districts has had unfortunate results, includ-

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109. PRESIDENT'S COUNCIL ON COMPETITIVENESS, *supra* note 1, at 3.

110. *Id.*

111. *Id.*

112. *Id.*

113. Core materials include the names and addresses of people having knowledge likely to bear on the claims and defenses, and the location of documents most relevant to the case. Sanctions for failure to respond to such requests would result in the offending party being barred from engaging in any further discovery. *Id.* at 16.

114. *Id.* at 17.

115. FED. R. CIV. P. 26(a)(1).

116. *Id.*; *see also* Leslie M. Kelleher, *The December 1993 Amendments to the Federal Rules of Civil Procedure—A Critical Analysis*, 12 TOURO L. REV. 7, 87 (1995) (discussing the opt-out provision).

117. *See* Ron Coleman, *Skepticism Runs Rampant as the Federal Courts' Experiment with Discovery Reform Hits the Two-Year Mark*, 81 A.B.A. J. 76, 76 (Oct. 1995) (citing a study by the Federal Judicial Center noting that 28 of 112 federal districts have rejected mandatory disclosure, while 21 have modified the rule); Mark Hansen, *Early Discovery Hits Snag: More Than Half the Federal Courts Modify or Reject New Rule*, 80 A.B.A. J. 35, 35 (May 1994) (noting some criticism of the Federal Judicial Center's tally).

ing forum-shopping and satellite litigation.[118] These rules should be made uniform throughout the federal system, and similar efforts should be adopted in state courts in order to make our civil justice system more equitable and efficient.

As more than ninety percent of the civil lawsuits in this country are settled or disposed of prior to trial,[119] mandatory settlement conferences by judges after an initial exchange of information can also move cases along. The goals would be to identify the areas of controversy and to seek to resolve them at an earlier stage. This would necessitate earlier preparation by the parties, promote settlement, and reduce transaction costs. The new Federal Rules of Civil Procedure encourage settlement by requiring parties in all cases to hold a pretrial discovery meeting to discuss the claims and defenses in the action, develop a discovery plan, and explore the possibility of settlement.[120] In addition, alternative dispute resolution (ADR) mechanisms should be encouraged, but not required. These include: (1) early neutral evaluation; (2) mediation; (3) arbitration; and (4) summary jury trials.[121]

3. Remove Judges from Politics.—Finally, I want to suggest that all states should undertake a maximum effort to remove judicial appointments from the partisan political process. Pennsylvania, for example, is a major offender in this regard. Every judge, from the lowest magistrate to the highest justices of the supreme court, must run for election on a partisan ballot. Voters have no idea for whom they are voting or why. If they do, it is frequently for the wrong reason. A process that takes the judiciary out of partisan politics would go as far as any other single change towards effecting the kind of civil justice reform discussed in this Article.

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118. *See* Coleman, *supra* note 117, at 79 (noting that plaintiffs may consider discovery rules in determining where to file); John C. Koski, *Mandatory Disclosure: The New Rule That's Meant to Simplify Litigation Could Do Just the Opposite*, 80 A.B.A. J., 85, 87 (Feb. 1994) (discussing the strain on the judicial system as parties litigate the parameters of the new rule).

119. PRESIDENT'S COUNCIL ON COMPETITIVENESS, *supra* note 1, at 7. While many litigants believe the only channels to resolution are formal litigation and informal negotiation, I am an enthusiast of, and I think more emphasis ought to be placed on, alternative dispute resolution (ADR) mechanisms. ADR promotes the settling of disputes away from the courts through contractual provisions or by consent of the parties.

120. FED. R. CIV. P. 26(f); *see also* Kelleher, *supra* note 116, at 89-92 (discussing the discovery meeting in detail). Like Rule 26(a)(1), Rule 26(f) allows district courts to modify or exempt themselves from this requirement, and several district courts have done so. *See id.* at 91-92.

121. *Id.*

If a system of elected judges must be maintained, then once elected, the judges need to be subject to firm rules governing their conduct on the bench. They in turn must lay down equally firm guidelines for attorney discipline to deal with improper activities, including the abuse of the discovery mechanisms mentioned above.

CONCLUSION

The first wave of change in tort reform was characterized by the medical malpractice insurance crisis of the 1970s and the perception that tort laws favor plaintiffs.[122] A decade later, the second wave focused on product liability and resulted in most states tightening their rules on joint and several liability.[123] The third and current wave of change is upon us. It features debate over the erosion of American competitiveness, the use of the threat of litigation as a weapon, joint and several liability, "loser-pays" rules, and congressional, as opposed to state, action.[124]

The House and Senate took the first steps toward meaningful reform of our civil justice system this year by passing products liability legislation.[125] President Clinton's veto, however, frustrated the completion of the reform process for now.[126] Despite this setback, the measure's success in Congress indicates that real progress is possible in the future.

The real issues are not political but relate to a lagging American global competitiveness and a liability system that, at best, makes marginal contributions to product safety and national well-being.[127] Reform is urgently needed to reflect America's continuing commitment to justice, innovation, and the continuing improvement of American employment and living standards for generations to come.[128]

American lawyers could well heed the admonition of Abraham Lincoln, a crafty and experienced litigator himself, who advised: "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses and waste of time."[129]

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122. Middleton, *supra* note 76, at 57.

123. *Id.*

124. *Id.*

125. John F. Harris, *Clinton Vetoes Product Liability Measure; Move Triggers Barrage of Accusations Between White House and Hill Republicans*, WASH. POST, May 3, 1996, at A14.

126. *Id.*

127. KIRKLAND & ELLIS, *supra* note 1, at 30-33.

128. *Id.*

129. Abraham Lincoln, *Notes for a Law Lecture (July 1, 1850)*, *in* THE LIFE AND WRITINGS OF ABRAHAM LINCOLN 329 (Philip Van Doren Stern ed., 1991).

In truth, the real loser from a failure to reform our costly tort laws may be American working men and women. Our lessened ability to compete in world markets and slower economic growth at home will generate fewer high-quality jobs and will result in a decreased standard of living. Defending a system that promotes such a result does no favor to this country or its citizenry.

Mr. DELAHUNT. One other question. I think the chairman, in his question, was in some respects trying to quantify, if you will, the problem in terms of whether it is frivolous lawsuits, or collusive settlements.

Again, do you see a problem, Mr. Thornburgh, in terms of collusive settlements that were, I thought, passionately and eloquently articulated by Professor Koniak?

Mr. THORNBURGH. Do I see a problem? I would certainly say that any action on the part of either side of a lawsuit that distorts the process of providing equal justice under law ought——

Mr. DELAHUNT. But do you think in reality a problem exists as represented by Professor Koniak?

Mr. THORNBURGH. I would not doubt those instances that have been cited; absolutely not.

Mr. DELAHUNT. Thank you.

Mr. COBLE. Folks, we have a vote on. I will ask you all to stand easy and we will return immanently at which time Mr. Rogan will be allowed to question you all. We should be back in 10 or 12 minutes.

Mr. ROGAN. Mr. Chairman.

Mr. COBLE. Yes.

Mr. ROGAN. I do not know what is the pleasure of the committee or the chair. My questioning is probably just a minute or two.

If the Chair was inclined to dismiss the panel, I would be happy to just submit my question very quickly. I do have a couple of additional questions that I could submit to General Thornburgh in writing.

Mr. COBLE. All right. That would be okay.

Mr. CONYERS. Mr. Chairman.

Mr. COBLE. Yes.

Mr. CONYERS. Could you let him question the witnesses on the record and he would let them go.

Mr. COBLE. If you could do that, Mr. Rogan, that would serve conveniently for the panel.

Mr. ROGAN. I want to thank the panel for their appearance here today.

The picture is very bleak that is being painted. It covers everything from plaintiffs' attorneys who are just seeking to gain the highest settlements so that they can get the highest attorneys' fees versus collusive defendants who are trying to obtain res judicata at the lowest verdict.

Also we hear about the concept of judges running procedure simply to clear their calendars. It sounds as though this is not a peculiarity limited to class action suits.

My question to the panel is this: Is there a greater dynamic here, within the tort system, that is simply failing the judicial process?

Mr. COBLE. Folks, do it tersely because we are on a short leash here.

Mr. SCIRICA. I feel compelled to say something on behalf of the Judiciary here this morning. I think that something has changed in the last 10 years and that is we have actions that involve thousands, and sometimes hundreds of thousands of cases.

Yes, that quantitative difference can make a qualitative difference in how the cases are handled. Mass filings can threaten the

prompt adjudication of legitimate claims. Courts are faced with unreasonable delay.

They see limited funds and the possibility of disparate verdicts on liability and damages that can raise serious questions of fairness.

Mr. COBLE. Judge, if you would suspend a minute.

We are blessed with a good talented panel here, Jim. I hate to do it in a rush-up fashion. If no one objects, why do we not adjourn for the moment to vote, and then come back, Jim, and we will resume your questioning.

I hope we will not inconvenience you all too much, but I want to take advantage of this full ahead. We will return soon.

[Recess.]

Mr. COBLE. I, again, apologize to the panel for not being able to release you all, but I felt like since we had an arsenal of talent before us, and Mr. Rogan had questions, I thought it would be better to go ahead and put those questions to you all eyeball-to-eyeball. Then we will get you out of here at a reasonably convenient time. So, the Gentleman from California.

Mr. ROGAN. Thank you, Mr. Chairman.

I want to thank the panel for their patience. Judge Scirica, as a former judge myself, I was very intrigued and pleased to see you just about to launch into a defense of the Judiciary. If you would continue please.

Mr. SCIRICA. As I was saying, I think that mass filings can threaten the prompt adjudication of legitimate claims. The Courts are often faced with problems of unreasonable delay, of limited funds or limited assets, and the possibility of disparate verdicts on liability and damages.

What I am saying is that there has been a change in the operation of class actions in the last few years. The District Courts and the Courts of Appeals have been grappling with it. We have not always come up with the right answers.

Sometimes the District Courts in dealing with these issues have tried different mechanisms. If a decision by a District Court was unwarranted, the Court of Appeals has stepped in. The appellate process works. In my own circuit, the third circuit, a couple of the settlements that were approved were overturned by our court.

So, I am confident that the Judiciary has been handling the matter as well as they possibly could and will hopefully be able to improve on that in the future.

Mr. ROGAN. During our brief recess, I had a chance to chat with Professor Koniak. We did not get a chance to really get into this topic during our informal discussion. Did you want to add to that?

Ms. KONIAK. Having been so hard on both the plaintiffs' bar and the defendants' bar, let me say that—I want to say something about the defendants' bar that is complementary.

Their job is to protect their clients. In a system in which people are available and judges might approve a bad deal, shopping around for a lawyer who will give your defendant the best deal possible is what one would expect a defendants' lawyer to do.

Many defendants' lawyers say to me privately that they do not want to practice in such a world in which that is their job; looking,

you know, for a plaintiff's lawyer willing to sell out the class, her clients.

Now, as to the plaintiffs' bar, if someone offers you $45 million to do nothing for your client and you know you can walk into a court and that might be approved, you know, rationalization takes over.

You can be a very good person and then you say to yourself, gee, this does not look so bad. True, they get nothing, but nothing suddenly looks like something. When you have $45 million in fees to help you see things that way. Who among us could withstand that kind of temptation.

Judges have discretion here. Some of them exercise it wisely. I think too many do not and that is why I think we need some rules here about what can go on that stops the temptation that is now so prevalent.

Mr. ROGAN. How far should judges go, or can judges go beyond the pleading and beyond the initial hearings, settlement conferences, etc. to make a fair determination as to whether these fees are reasonable without essentially becoming a party to the litigation themselves?

Ms. KONIAK. Well, I mean they can do things like appoint someone whose job it is to review the settlement and look for problems with the settlement. That would ensure that the judge has more information. The average time in a fairness hearing is 41 minutes—41 minutes to access whether millions of dollars is being exchanged fairly and without corruption.

Now, how much information could a judge get in 41 minutes. I sat in a fairness hearing in New York City in a major securities class action case in which the Federal judge in that case had class counsel stand up and say, is this a wonderful settlement? Yes, it is.

The defendants' lawyer then agreed: wonderful. At the class' expense, about 20 experts had been flown in from all over the country who stood up in the audience so the judge could look at them.

Class counsel said, look, we have all of these people here. No one testified. No one was examined. The case was In re: Payne Webber. It was a multi-million-dollar settlement. The judge approved it. It took very little time and almost no testimony. That has to stop.

Mr. ROGAN. General Thornburgh?

Mr. THORNBURGH. I think you kind of get back into this question of what the purpose of a class action suit is: if it is to serve some social goal in concert with what the Congress and the administrative agencies do, a fee that might otherwise look exorbitant compared to what the actual plaintiffs' got is arguably fair. But if you adopt the model of a procedural rule, it is pretty hard to justify a multi-million fee for the lawyer when the client got a coupon.

I think obviously my tendency is to view these proceedings through the lens of a procedural rule and lament the fact that it has been expanded in ways that might otherwise be better handled elsewhere.

I want to say one other thing if I might, Mr. Chairman, just to interject a footnote. The question was raised as to if removal or preemption brings a cluster of cases from the State courts into the

Federal courts, is that not going to pose some judicial manpower problems.

I think probably that would be true at the outset. One of the reasons for supporting that kind of change is that the Federal courts have shown a much greater propensity to bring some sensible adjudication to the creation of classes and the progress of class cases.

So that when that pig went through that particular python, you would then have a much more orderly process that would discourage the bringing of the kinds of suits that we are expressing some concern about.

It would also shorten the time frame of those suits so that the judicial manpower question is somewhat diminished by that phenomenon, I think.

Mr. ROGAN. I see by the red light that my time is expired. So, I will set a good example for the entire panel and my colleagues by ceasing my questions.

Mr. COBLE. Thank you, Mr. Rogan.

I see we have been joined by our friend from the Roanoke Valley, Mr. Goodlatte, the Gentleman from Virginia.

Mr. GOODLATTE. Thank you, Mr. Chairman.

I am interested in the issue of attorneys fees with regard to class action suits. I am generally not one who supports Congressional interference in the marketplace.

I am generally opposed to the idea that we should limit, for example, the opportunity of plaintiffs' attorneys to enter into contingent fee agreements for whatever percentage they and their client chose to contractually agree to.

I do see abuses in this area. I wonder if Professor Koniak, have you ever seen a circumstance in which a court appoints a separate attorney to review the fee arrangement and represent the plaintiffs in a class action, separate and apart from the attorneys who are representing them in the underlying substantive cause of action, but in the question of what are fair attorneys' fees?

Ms. KONIAK. Well, in the Prudential settlement, which is a huge settlement involving $90 million in fees to the firm of Millburg Weiss, the judge appointed a special master to look at the question of fees.

I read that report. Let me just say, it did not seem independent. You know, the special master, who is usually another lawyer——

Mr. GOODLATTE. Sure. But a special master is being put in the place of the judge to give the judge advice on how to make the final ruling, but listening to both sides. I am talking about an advocate.

Ms. KONIAK. Well, that is what I am talking about too. In my experience, special masters on fees do not work. An advocate, I have never seen used, but I think would work better.

Bidding; there are some judges who have experimented with bidding; having class counsel bid to represent the class. What will you get for the class? What fee would you be willing to charge for this kind of result? These judges have held auctions for the right to represent the class.

One of the problems with that has been collusion among the plaintiffs' lawyers: they all put in the same bid. I think that is a violation of the anti-trust laws. It should be stopped. If that were controlled, bidding could help. I think an advocate would also help.

Mr. GOODLATTE. Mr. Frank, would you like to comment on this?

Mr. FRANK. I would be grateful. If I may, Mr. Goodlatte, I would like to refer you in my own statement to Exhibit B. There is a chart there. I am going to call off some of the numbers and then show you one exhibit, if I may.

The case against New York Life, in which I turned out to be a member of the class, to my surprise. My victory was that I could borrow some money from New York Life to pay my premium. I do not need the money.

Counsel got $22 million. In the case against GE Capital Mortgage, the class members each got $2.20. Counsel got $200,000. In Rosenfeld against Bear Sterns, plaintiffs got nothing. Counsel got $500,000.

In Straumer against Capital Mortgage, plaintiffs received less than $1 and no more than $2. Counsel fees were not to exceed $500,000.

In the Prudential case reported December 4, 1995, 350,000 investors got $200 apiece and counsel got $34 million. My friend says even more.

Mr. GOODLATTE. We are going to run out of time.

What do you think about the concept of having a separate attorney appointed by the court, totally independent of the plaintiffs' counsel, to represent the interest of the class in relation to their dealings with their attorney.

This is very different from an individual attorney entering into an agreement where they sit down in the office and they negotiate what fee is going to be paid to that attorney.

Here, it is dictated to them by the court. They have effectively no representation representing their interest apart from their counsel, who clearly has a conflict of interest on that point.

Mr. FRANK. It sounds like you are saying, Mr. Goodlatte, the intrusion of other counsel at that point would add some cost for it. It also might add some useful superintendents.

It could be helpful, but please be aware that what you are describing and what you want that person to do is precisely under Rule 23 what the counsel is supposed to do.

So, it is because the rule made representative is failing that we want to do the same thing over again with another independent counsel. In the circumstances, I think that would be an improvement.

Mr. Chairman, may I take the liberty of showing you one exhibit by eye because I think we are about to adjourn?

Mr. COBLE. Without objection.

Mr. FRANK. It is one item I would like to show you as a visual representative of what we are talking about. This is a copy of a check that somebody got in a class action victory. It is attached to Exhibit B. It is the case of DeBoer against Mellon Mortgage Company.

You will see that the victors each received 8 cents. They are told that if they will only write in for the 32-cent stamp or make a telephone call long distance, they can get more information about their 8-cent victory. I submit that a system that results in this is not a very good system.

Mr. GOODLATTE. Your point is well-taken. Mr. Chairman, if I could have a few more minutes, I would like to give Attorney General Thornburgh and Judge Scirica an opportunity to respond.

Mr. COBLE. Without objection.

Mr. GOODLATTE. General Thornburgh.

Mr. THORNBURGH. I think any kind of suggestion that can get to this quandary of the disproportionate relationship between fees and recoveries is worthy of consideration. I am not sure that the introduction of yet another lawyer advocate is the answer.

Mr. GOODLATTE. I am not suggesting that he gets a contingent fee as well. He might be paid by the hour.

Mr. THORNBURGH. I think calling him an independent counsel in today's environment might not be the best thing.

Mr. GOODLATTE. I do not make any association between that either.

Mr. THORNBURGH. I would encourage you to pursue those kinds of things because we obviously need some fresh thinking in this field.

Mr. GOODLATTE. Judge Scirica.

Mr. SCIRICA. I can tell you that in several cases, masters have been appointed by the district judges to review attorneys' fees. So, it is a practice that is being done. The courts have authority to do so.

Mr. GOODLATTE. I mean, the master is not necessarily the advocate for the class. He may be an arbiter or he may be an assistant to the judge in reviewing both sides' opinions and making recommendations.

I am talking about somebody getting in there and saying that, like some of the examples cited by Mr. Frank and Professor Koniak, that these are clearly abusive. These attorneys who do not achieve a result that results in any significant benefit to the class should not be entitled to multi-million dollar fees.

Mr. SCIRICA. I think you are correct in the sense that the job of the master really is to evaluate the fee for its veracity and to see how much work was actually done. Generally, the master is not going to evaluate the fee as to the settlement and as to what the class members get.

Now, that is the province of the court. The court does that when it decides to approve a settlement. Some of the suggestions that have come before the Rules Committees have been that we should list certain factors that the court should take into account when deciding whether or not to approve a settlement.

One of them is the attorneys' fees and its relationship to the class recovery as a whole. The other area where it can be looked at is at the time of the certification decision.

As I mentioned a bit earlier, the Rules Committee has under consideration an amendment that would allow the judge to consider the cost and burdens of the litigation as compared to the probably relief to the individual class members.

That was intended to get at that situation where the relief to the individual class members would be very, very small. The burdens would be quite large, at least on the court and everyone else involved. That is still on the table. That has not been approved.

Mr. GOODLATTE. Thank you. Thank you, Mr. Chairman.

Mr. COBLE. Thank you, Mr. Goodlatte.

Senators Grassley and Kohl in the other body have expressed an interest in this matter as well. We look forward to working with Senator Grassley and Senator Kohl.

Without objection, Senator Kohl's statement will be incorporated and made a part of the record.

[The statements referred to follows follows:]

PREPARED STATEMENT OF HON. HERB KOHL, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Mr. Chairman and members of the Subcommittee, let me thank you for convening this hearing. The issue you are addressing today—class action abuses—is a serious problem. Too many victims are being shortchanged, while *their* lawyers are lining their pockets with exorbitant fees.

Let me give you just one truly disturbing example, offered by one of my constituents who testified before the Senate Judiciary Committee last October. She had been an unnamed member of a class action lawsuit against her mortgage company. While she did not initiate the suit, the class action lawyers were supposed to represent her. Instead, they negotiated a settlement that was at best a bad joke. Initially, she got four dollars and change in compensation. A few months later, her lawyers surreptitiously took $80 from her account. As a result of these kinds of transactions, her lawyers managed to pocket over $8 million in fees, but never explained *to their own clients* that the class—not the defendant—would pay the attorneys' fees.

Naturally outraged, she and others sued the class lawyers. But her suit was turned away on a technicality in federal court, even though Judge Easterbrook and other dissenting judges blamed the class lawyers for "pulling the wool over the state judge's eyes" and complained that unfair class action settlements are too easily "crammed down the throats" of overmatched victims.

Adding insult to injury, the lawyers turned around and sued her in Alabama—a state she had never visited—and demanded an unbelievable $25 million. So not only did she lose $75, she was forced to defend herself from a $25 million lawsuit. Mr. Chairman, this is truly a mockery of justice.

In too many cases, victims are dragged into lawsuits unaware of their rights and unarmed on the legal battlefield. In the end, they get little or nothing, while their lawyers cash in. Some of these suits may be frivolous, where no one stands to gain except unscrupulous lawyers. Even when the claims are real, sometimes defendants walk hand-in-hand with the class lawyers, buying protection from future lawsuits under unreasonably favorable terms.

Fortunately, there are a few steps we can take to weed out the worst abuses, while still protecting what is basically a pretty effective process for vindicating rights. We don't want to close the courthouse doors to important class action claims. And we don't have to.

Let me tell you what we can do. As a first step, we should enact the Class Action Fairness Act, which I introduced last year. It requires notice to State Attorneys General about proposed class action settlements that would affect residents of their states. An attorney general can then object if the settlement seems unfair. I addition, it requires notice to class members in *plain English*, of the terms of a proposed settlement, including the source of attorneys' fees. This proposal gives regular people back their rights and their representation.

Still we can do more. That is why I am working with Senator Grassley to put together a broader proposal. For example, we are considering limiting attorneys' fees to a reasonable percentage of the *actual* damages received by class members, paralleling what we did with securities cases. This way, class lawyers and defendants would be discouraged from conjuring up bogus settlement schemes that don't really deliver. For example, it was ridiculous for class lawyers to get millions in an airline class action case, when the class members only got coupons, most of which were never used.

We are also considering steering more class actions involving citizens from multiple states to where they belong—in federal court. The fact is that most class action abuses take place in state courts, perhaps because federal courts give closer scrutiny to class actions.

Mr. Chairman, there is bipartisan support for class action reform, so long as it is reasonable. Let me thank you for bringing this issue to the Committee's attention. I hope we can work together to pass an effective package of reforms. Thank you.

Mr. COBLE. Professor, gentlemen, we very much appreciate you all being here. The record will remain open for 1 week. So, if you all, in your collective wits, come up with something that you have failed to share with us, feel free to submit that within the next week. Thank you very much for being with us.

As the first panel is dismissing itself, I will ask the second panel to come forward. The Gentleman from Michigan.

Mr. CONYERS. I ask unanimous consent that the testimony of Attorney Brian Wolfman, Public Citizen Litigation Group be included in this hearing.

Mr. COBLE. Without objection.

[The prepared statement of Mr. Wolfman follows:]

PREPARED STATEMENT OF BRIAN WOLFMAN, ESQ., STAFF ATTORNEY, PUBLIC CITIZEN LITIGATION GROUP

Mr. Chairman and members of the Committee: I want to address two important topics: First, how to ensure that victims are adequately compensated in class action litigation; and second, how to ensure that plaintiffs' lawyers have adequate incentives to take on class action cases without reaping unjustified windfalls at the expense of class members. In a nutshell, the message that I want to convey today is this: We agree that some class action settlements provide little meaningful compensation for the victims but mammoth fees for their lawyers. We are in the courts every day fighting these settlements. But we also emphatically believe that this is a problem that the courts—not Congress—ought to address. And indeed, as I will recount in a moment, the federal courts are already taking important steps to police the class action process and significant strides have been made in that direction.

Before explaining the basis for my conclusion, however, it is useful that I describe my experience in class action litigation. I am a staff attorney with Public Citizen Litigation Group, a nonprofit, public interest law firm that was founded over twenty-five years ago, as the courtroom arm of Public Citizen, a consumer advocacy organization with over 100,000 members nationwide. Like other lawyers who represent consumers, we use class actions in situations where litigation of individual claims would not be economically viable. For example, I recently concluded litigating a class action case on behalf of food stamp recipients in South Dakota. These recipients had the value of their food stamp allotments illegally reduced by the value of home heating support payments they received from the government. We successfully litigated a related to case to judgment, and afterwards that case and the class action settled, with substantial relief to the class members. We collected a modest attorneys, fee from the government, after negotiations on relief to the class were concluded. Without a strong class action rule, however, claims like those of South Dakota food stamp recipients, which individually had a value of a few hundred dollars, are lost because of the economic reality that litigation is so expensive.

Precisely because we so highly value class actions, we have long sought to combat what we see as abuses in the class action system. Over the past several years, our organization has increasingly devoted resources to oppose what we believe to be inappropriate, or collusive, class action settlements. We have served as lead counsel or co-counsel to objectors in many of the high-profile class action cases, including *Bowling* v. *Pfizer* (Bjork-Shiley heart valve) ; *Amchem, Inc.* v. *Windsor* (Asbestos case, also known as Georgine); *Hanlon* v. *Chrysler Corp.* (Chrysler minivans); *Duhaime* v. *John Hancock Mut. Life Ins. Co.* (deceptive practices in selling life insurance); *In re General Motors Corp. Pickup Truck Fuel Tank Prod. Liab. Litig.* (GM C/K Pickup Trucks); and *In re Ford Motor Co. Bronco II Prod. Liab. Litig.* (Ford Broncos). We have also authored articles on the problems with 1class action litigation for law reviews, *see* Brian Wolfman & Alan B. Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 N.Y.U. L. Rev. 439 (1996), and for the popular press. *See* David C. Vladeck, *Trust the Judicial System to Do Its Job*, p. M5, The Los Angeles Times (April 30, 1995); Brian Wolfman, *Credit Worthy—Actions Should Suit Class Interests, Not Lawyers' Bank Accounts*, Los Angeles and San Francisco Daily Journals (Oct. 30, 1997).

We recognize that the impetus for these hearings is the growing perception that class action lawsuits have become a vehicle for enriching plaintiffs, lawyers at the expense of their clients. But this perception grossly overstates the actual abuse in class action settlements and ignores the vital and effective role that courts can and do play in rejecting or forcing the improvement of settlements that are unfair to

class members. Because of the diligence of judicial oversight, we see no reason for Congress to consider legislation in this area. Indeed, given the delicate balancing of interests that is reflected in the current class action rules, any legislation may well bring unwanted and unintended consequence; if reforms are needed, let the courts engage in fine-tuning, not the sort of broader-scale changes that are brought about through legislation. Let me use three real case examples to illustrate this point.

THE HEART VALVE CASE

The first case is the Bjork-Shiley Heart Valve case (*Bowling* v. *Pfizer*). When *Bowling* was initially settled, the settlement conferred far too little value on the class members and far too much in attorneys' fees on class counsel. *Bowling* was filed as a class action on behalf of more than 50,000 living recipients of the Bjork-Shiley heart valve, which has a tendency to fracture because of a design defect. The theory of the case was that class members suffered from "fear" that their valves might fail, and that they should be compensated for that fear and the problems that attend having a potentially deadly medical device implanted in one's body.

Unfortunately, the settlement initially negotiated by the parties was especially weak; it did not provide enough relief for patients who would benefit from reoperations, and it provided nothing for the patients' spouses. But after hearing objections from us and others, the district judge put pressure on the parties to amend the settlement, which resulted in a far fairer settlement that now provides $10 million for the spouses, and a much improved program of reoperation benefits (including full medical benefits, lost wages related to "explant" surgery, and a significant lump sum payment to cover various incidental expenses). This augments preexisting benefits, such as research to develop a non-invasive diagnostic tool to detect problem valves, and modest compensation to class members for their anxiety and for counseling (if needed). Although not perfect, it would be hard to claim that the class members did not receive real value from this settlement.

The fee request in this case came to $33 million dollars, which plaintiffs' counsel claimed was only a small fraction of the value of the settlement to the class. We opposed the fee request on the ground—which is our common plea—that the fee was far too large given the benefit conferred on the class. Part of our argument was based on the "lodestar" calculation of the plaintiffs, lawyers, which is the amount of hours they devoted to the case, multiplied by a reasonably hourly rate for their services. Most lawyers who handle *non*-contingent work generally bill at their lodestar. We claimed that the $33 million fee was so far above the lodestar amount that the gross disparity between the fee request and the lodestar underscored the unjustified nature of the request.

In a lengthy opinion, the district court agreed with our submissions and reduced the fee award to $10.25 million, plus allowing lodestar compensation for future work to implement the settlement. The ruling thus saved class members about $20 million, and it was affirmed recently by the United States Court of Appeals for the Sixth Circuit.

THE GM PICKUP TRUCK CASE

In some ways, this case was the poster child of those who criticize class action settlements. This case was brought on behalf of 5–6 million owners of GM C/K pickup trucks that had been designed with their fuel tanks outside of the protective frame-rail of the truck, making the trucks especially prone to fuel-fed fires. The case was filed to obtain a repair or retrofit of the trucks to reduce the fire risk. A settlement was quickly reached which provided that class members were to receive a $1,000 coupon, good for only 15 months, toward the purchase of a new GM truck or minivan. Additionally, class members could transfer the coupon to third parties, but then the coupon was worth only $500 and could not be used in conjunction with any of the ubiquitous GM rebates and credit deals. There were other restrictions on the use of the $500 coupon that made it virtually worthless. The settling parties' own expert conceded that 54% of the class would get nothing from the settlement; our experts believed that no more than 10% of the class would get any value from the settlement, while it would be a marketing bonanza for GM. And GM agreed that the plaintiffs, lawyers were entitled to $10 million in costs and fees, coupled with an addition $10 million for settling on identical terms a state-court class action limited to Texas truck owners. Over our very vigorous objections, the district court approved both the settlement and the fees, and we appealed.

In what is now a landmark class action ruling, the United States Court of Appeals for the Third Circuit reversed. Two aspects of the court's ruling are especially pertinent here. First, the court found the settlement unacceptable since it failed to pro-

vide adequate benefits to the class. This aspect of the court's ruling is highly significant, since it directs the district judges to ensure that settlements in fact confer real value on class members, even where there are no class members objecting to the settlement. Next, the court rejected the fee request on the ground that it was way out of line and severely questioned GMIs apparent complicity in allocating such a large share of the monies that could have been made available to compensate class members for the fee to plaintiffs, lawyers. This ruling has significantly tightened the standards applicable to class action settlements.

JOHN HANCOCK MUTUAL LIFE INSUZANCE COMPANY

This is a case brought on behalf of hundreds of thousands of current and former policy holders who were subject to false or deceptive sales practices by John Hancock. The settlement, which was presented to the district court for its approval just last week, creates an elaborate claims payment system to provide individualized relief to any Hancock policy-owner who can show that he or she was subjected to improper sales practices by Hancock. The claims system is weighted in a claimant's favor, and some claimants should automatically receive not only whatever compensation is owing to them, but also a small bonus. The settlement also provides modest general relief in the form of discounts on John Hancock insurance and investment products to class members who choose to forego the claims payment system.

On behalf of former Senator Howard Metzenbaum, who is a Hancock policy-holder and a member of the class, we objected to this settlement on two grounds. First, we thought that the notice to class members was impenetrable in a number of key respects, which would make it much less likely that deserving claimants would, in fact, pursue their claims for redress. Fortunately, the settling parties agreed to amend the notice to clarify and strengthen it to ensure that claimants were fully advised of their rights. Second, and more problematic, the settlement called for an award of $39 million in attorneys' fees. We opposed that aspect of the settlement, but for reasons that go to the heart of this Committee's inquiry.

Plaintiffs, counsel justified their fee request on the ground that it is likely that the settlement would put over $400 million of cash into the pockets of aggrieved class members. If that proves correct, then the fee would amount to just over 9% of the fund created for the class—an amount that is not, under traditional legal doctrine, excessive, especially given the risk of non-compensation in litigation like this. After all, similar cases have been dismissed, like the one the same plaintiffs' lawyers brought against the Mutual of New York ("MONY"), and the Hancock case had been hotly litigated for close to two years prior to settlement.

The problem in *Hancock*, as is true of many class action settlements, is that there is no way to know at the time the settlement is approved what its *actual* value will be to the class members. To be sure, the settling parties produce "experts" who give their opinions as to the extent to which class members will actually use the claims procedure and obtain compensation. But those predictions have proven in the past to be wildly optimistic. For that reason, we argued in *Hancock*, and in prior cases, that the attorneys' fee in these cases must be linked to the actual benefit conferred on the class, not simply the amount of money that might *theoretically* be available to the class. In that event, class counsel have every incentive to work to ensure that real value is conferred on class members, since counsel's fee will depend on the extent to which class members actually benefit from the settlement. We should learn in the next few weeks whether the court agrees with our approach.

LESSONS FROM OUR EXPERIENCE

Our experience in litigating these cases and studying class action litigation have taught us a number of lessons that are germane to this Committee's inquiry.

1. Courts can effectively police improper or abusive class action settlements. Indeed, if one looks at the major class action rulings over the past couple of years, they all are geared towards tightening the standards for class action settlements to ensure that class members, rights are fully protected. The Supreme Court's recent decision in *Amchem*, the Third Circuit's ruling in *GM Trucks*, the Fifth Circuit's ruling in *Castano*, and the Ninth Circuit's ruling in *Matsushita*, all reflect a growing sensitivity on the part of our federal courts to the problems that arise in class action litigation and the necessity for vigilant judicial oversight.

2. Do not rush to blame the plaintiffs' lawyers for bad class action settlements; corporate defendants are often the motivating force behind these settlements. Conventional wisdom places all of the blame for poor class action settlements on avaricious plaintiffs, lawyers, who are more interested in padding their fees than the rights of the class members they nominally represent. Don't believe that myth. The moti-

vating factor here is often a corporate defendant that knows full well that it made a defective product and wants to liquidate its liability as expediently and cheaply as possible. Lawyers call this phenomenon "buying *res judicata*," or in lay terms, buying immunity from future liability at a low cost.

Think about it for a minute. Suppose your company made defective widgets, and began to see lawsuits being filed by disgruntled purchasers. Rather than litigating the cases one-by-one, and enduring the legal fees and transaction costs that come with individualized litigation, your company would almost certainly want to be sued on a class basis and settle all claims against it for as little as possible. Companies often induce the filing of class claims, and then engage in what Professor John Coffee of Columbia Law School calls a "reverse auction;" that is, settling the case with the attorney who offers the cheapest settlement, often for an inflated fee. That is why it is hypocritical for corporate lawyers to rail against these settlements; after all, it takes both parties to settle these cases and any corporation that opposes class action settlements can just say "no."

Fortunately, courts have become attuned to this problem, and the procedures that have been imposed by the decisions I've mentioned generally bar sweetheart settlements of that sort. But to the extent that this Committee believes it is important to engage in blame-laying, much of the blame for collusive settlements should be borne by the companies that seek to benefit from them, and often pay inflated fees to plaintiffs, lawyers to induce them to participate. Perhaps the textbook example of this is the Ford Bronco II settlement, which conferred virtually nothing of value on the class members (including a "free" flashlight and map, if the class member agreed to purchase Ford's cellular phone service), while providing a very large fee to the plaintiffs, lawyers and a very broad release from liability to Ford. In rejecting the settlement, the district court judge explicitly raised the possibility that Ford had colluded with the plaintiffs' lawyers in reaching this obviously inadequate settlement.

3. The issues here are highly complex, and whatever adjustments need to be made to class action procedures should be made through judicial fine-tuning of broad rules. As you may know, the Civil Rules Committee, which is responsible for recommending rule changes to the United States Supreme Court, has paid substantial attention to Rule 23 over the past several years and actually considered proposing very substantial revisions to the rule to curb the possibility of abuse. After careful deliberation, however, the Committee proposed very modest changes, persuaded that no wholesale alteration of Rule 23 is warranted at this time, particularly in light of the Supreme Court's June 1997 ruling in *Amchem* v. *Windsor*, which tightened the requirements for class action settlements. We concur in that view. Many of the criticisms of Rule 23—especially those that go to the possibility of sweetheart settlements that confer little of value on class members—are being addressed by the courts. As to the attorney fee issue, there are a host of creative ways of policing unjustifiedly large fee requests, and the courts are now experimenting with some of those techniques—like the actual recovery approach to fee awards we urged in *Hancock*. Congress should not intervene until it is clear that the courts have tried to put their own house in order and have failed. We are nowhere near that point today.

4. Finally, the issues here are often poorly understood by the public, and public education—including hearings like this—can be important. One explanation for public concern over class action settlements is that often the overall value of the settlement is not apparent, fueled, on occasion, by media misunderstanding. Take a prototypical consumer class action case. Suppose a bank overcharged customers an average $5 per year. A class action on behalf of 15,000 bank customers may yield a settlement that amounts to, lets say, $10 in payment to each class member, $150,000 in liability on the bank's part, but an attorneys' fee of $50,000. Why, it might fairly be asked, is the lawyer getting fees that amount to one-third of the recovery for the class? The answers are that it is costly to handle complex class action litigation, and that the value of the settlement far exceeds $150,000, because the settlement will deter future misconduct by the bank, and indeed by other banks. Consumer class actions serve that valuable, but largely invisible, purpose.

Moreover, the lawyers who handle these cases often do so at tremendous financial risk. These cases are generally handled on a contingency fee basis, in that the plaintiffs, lawyers get paid *only* if the class prevails. Press accounts focus only on those class actions that result either in a judgment for the plaintiffs' favor or a settlement in their favor. Lurking just beneath the surface are cases that result in dismissal or a judgment for the defendant, with the plaintiffs, lawyer not simply losing the case, but an enormous investment of time and money.

It is imperative to maintain a system that retains fair incentives to encourage lawyers to undertake the considerable risks of non-compensation in handling class

action lawsuits. And it is imperative that the American people understand that our system of justice depends on the availability of counsel willing to undertake this risk. Given our market economy, the incentive to do so must be the prospect of a substantial fee in the event the case settles or is resolved in the plaintiffs' favor.

We urge this Committee to monitor carefully the progress of our federal courts as they develop rules and procedures to govern the conduct of these class action cases. But, again, there is no need at this time for legislation on this issue.

Mr. COBLE. The first witness on the second panel will be Mr. Ralph G. Wellington, who is with the firm of Schnader, Harrison, Segal, and Lewis. Mr. Wellington is a member of the firm's litigation department and executive committee.

He has extensive trial and appellate experience in securities, aviation, products liability, intellectual property, and commercial law. Mr. Wellington received his J.D. from the University of Michigan School of Law and his B.A. from Kalamazoo College.

Our second witness is Mr. Jack Martin, who is Vice President and General Counsel at the Ford Motor Company. Mr. Martin earned various scholastic honors in college and law school.

He is a speaker at Continuing Legal Education seminars and similar forums, including the Conference Board, the Practicing Law Institute, and the American Bar Association meetings. He was awarded his J.D. degree in 1961 from DePaul University.

Our next witness on this panel is Mr. John L. McGoldrick, who is Senior Vice President for Law and Strategic Planning and General Counsel of the Bristol-Meyers Squibb Company; one of the world's largest diversified health and personal care companies, and actively involved in my State, I might add.

Mr. McGoldrick is a member of the companies' management committee and has extensive experience with class actions, both as plaintiffs' attorney, as well as defense counsel. He is a graduate of Harvard College and the Harvard School of Law.

Our next witness is Ms. Elizabeth J. Cabraser of the San Francisco law firm of Lief, Cabraser, Heimann, and Bernstein. She has more than 19 years of experience representing plaintiffs in civil litigation.

Ms. Cabraser received her undergraduate and law degrees from the University of California-Berkeley. She has written and lectured extensively on Federal Civil Procedure, complex litigation, and multi-State class actions, among other topics.

Our final witness on this panel is Dr. John B. Hendricks, who is President at Alabama Cyrogenic Engineering, Incorporated. Mr. Hendricks is a physicist and a former professor of physics at the University of Alabama, and an active member of the U.S. Chamber of Commerce Small Business Council.

His company has four employees and provides cooling system research and development services for large space projects. NASA and Department of Energy are his two most significant clients; two largest clients, perhaps I should say. All of your clients are significant, right, Dr. Hendricks?

Mr. HENDRICKS. Yes, sir.

Mr. COBLE. We have written statements from each of you. I ask unanimous consent to submit them into the record in their entirety. We are pleased very much folks to have you all with us. The best laid plans of mice and men go array as you observed this morning. We do try to comply with the five-minute rule. We are

going to have another vote on the Floor, John, in about an hour. It may be even less than that. So, it would be good if we could wrap this up. If we cannot, we can always come back.

I do not want to accelerate this to your detriment because we want to hear from you. If you all can comply with the five-minute rule, we will be appreciate to you. Your written statements have been examined and will continue to be examined in detail.

It is good to have all of you here I will remind you again, when that red light illuminates into your face, you will know your time is about to expire. Mr. Wellington, why do we not start with you.

STATEMENT OF RALPH G. WELLINGTON, ESQ., SCHNADER, HARRISON, SEGAL, AND LEWIS, LLP

Mr. WELLINGTON. Thank you, Mr. Chairman.

Because of the consistency of a number of the comments which the committee heard from the first panel this morning, I believe that I will be able to abbreviate my comments a bit because you are going to hear similar views from me.

I come at this from the perspective as a partner in a major east coast law firm with extensive experience in class actions. While my firm and I most commonly appear representing corporate defendants, I want to make it clear that I am not a crusader against class actions.

I believe that class actions are an important way of correcting injustice and providing access to our judicial system for individuals whose claims may not rise to the level that would otherwise permit them to be redressed.

There are many meritorious class actions filed by competent and conscientious plaintiffs' class action counsel; many of whom are my friends. There are problems and abuses that occur. That is what this panel is interested in, this committee is interested in, and that is what I am here to address.

Congressman Moran this morning mentioned a particular case of interest to him; the Bank of Boston litigation that had taken place in Mobile, Alabama. Because of my own personal role in that litigation, I believe, it is one of the reasons why I was invited to testify today.

Briefly, there was an underlying action there filed in Mobile County called *Hoffman* v. *Bank Boston* on behalf of several hundred thousand people. It was certified as a nationwide class.

Those several hundred thousand people had their rights adjudicated in Mobile State Court through a settlement worked out and presented to the court by class counsel and defense counsel.

Most of those several hundred thousand people received a minimal direct economic benefit. Some received no direct benefit at all. Indeed, most had their mortgage accounts that were held by Bank of Boston deducted in order to pay the class action counsel nearly $9 million.

In short, having been included in a lawsuit they never envisioned, they had their own money from their own accounts taken to pay class counsel they had never met for what many believe was a dubious benefit.

The question there was, what redress did those class members have when they found out their bank accounts were being de-

ducted? We, in fact, filed a Federal lawsuit in the Northern District of Illinois on behalf of all of those class members asserting a malpractice action against the plaintiff class.

Ultimately, the Federal courts determined, by an en banc decision in the Seventh Circuit Court of Appeals, that the Federal courts did not have access or jurisdiction to review what had happened in the State court proceeding in Alabama.

Judge Easterbrook, with Judge Posner and others joining, wrote a vigorous dissent indicating that class members should have a right to bring such challenges where absent class members had, had their rights determined inappropriately, in a State in which they were not citizens.

Professor Koniak's article in the University of Virginia Law Review, which I urge this committee and its staff to review, entitled "Under Cloak of Settlement," addresses those issues at length and that case at length.

The fundamental problem that I have seen from a defense counsel perspective in class actions is that for certain unscrupulous class counsel, it becomes only a means of making money without any accountability to clients.

As has been mentioned earlier today, too many defense counsel, because of their interest to their clients, then end up agreeing to a consensual settlement that does not serve the interest of the class.

In this committee's review of potential remedies to this problem, I urge the following considerations. First, stricter requirements should be made that notices sent to class members tell the truth in clear language.

It is possible to tell class members clearly and simply what benefit they will receive, how much money class counsel will receive, and where that money will come from. Obfuscation in class notices is intentional and is usually there to camouflage what is really going on.

Secondly, I strongly support that nationwide class actions should not be decided in State courts that often lack the experience, the independence, and the resources to assure that they are not being presented with a collusive settlement by plaintiffs and defendants. So, I do support the Federal jurisdiction of these matters.

Thirdly, if a defendant does not chose to remove a case, I believe that settlements that class members outside of that State believe to be unfair should be subject to a collateral attack or that plaintiffs' counsel should be subject to malpractice.

Finally, much like the self-executing disclosure that is now present in Federal court litigation, I believe that class counsel should be required to disclose to any court where they seek nationwide certification, prior settlements in class actions, and fees that they have received, any disciplinary actions to which they have been subject, and malpractice suits brought against them involving their role as class counsel.

That information should be made available to a court where they are asking to be appointed as counsel to clients who will never, ever meet them, have a chance to interview them, or have a chance to retain them.

In summary, I view the problem is not class actions, per se, or the pure dollar amounts that class action counsel sometimes receive.

The problem is the potential abuse of collusive settlements where unscrupulous plaintiffs' counsel have commenced a litigation solely to obtain a large fee rather than to conscientiously pursue the real interest of the class.

What this committee should be addressing are ways to decrease that likelihood and to provide class members a remedy when that occasion abuse does occur. Thank you.

[The prepared statement of Mr. Wellington follows:]

PREPARED STATEMENT OF RALPH G. WELLINGTON, ESQ., SCHNADER, HARRISON, SEGAL, AND LEWIS, LLP

SUMMARY

Occasional class action abuses usually arise from a coming together of several factors: (a) plaintiffs' counsel whose interest in the class action is fee-driven, rather than as a means to obtain a just result for far flung clients with whom they have no personal attorney/client relationship; (b) the interest of defense counsel in resolving the class action as quickly as possible, with the broadest possible adjudication of potential rights of the plaintiff class; and (c) nationwide certification of class actions by state courts who sometimes lack the resources and experience to independently assess the true benefit to the class of a settlement submitted jointly by plaintiff and defense counsel. Reforms to be considered should include the following:

1. Actions filed in state court that seek nationwide certification should be removable by defendants to federal court, where judges are more familiar with class actions and nationwide jurisdictional issues.
2. If a defendant does not remove an action where nationwide certification is sought, and a state court disposes of the rights of citizens of other states over whom the state court has no personal jurisdiction, that judgment should be subject to challenge by class members in other states if they believe that they have been defrauded or that plaintiffs' counsel committed malpractice through a collusive settlement.
3. Class notices should be written in plain language. It is possible to tell class members clearly and simply what benefit they will receive, how much money class counsel will receive, and where that money will come from (from the defendant or out of the benefit being given to the class).
4. Much like the self-executing disclosure now present in federal civil litigation, class counsel should be required to disclose to any court where they seek nationwide certification (a) prior settlements in class actions and fees received by them, (b) any disciplinary actions to which they have been subject, and (c) any malpractice suits brought against them involving their role as class counsel. If class counsel is asking a court to certify that they are the proper lawyers to represent thousands of citizens across the country, the burden should be on class counsel to provide all pertinent information regarding their adequacy and to demonstrate that they warrant such an appointment.

STATEMENT

I wish to thank the Committee for the invitation and the opportunity to address certain class action issues.

I am a Partner in a major East Coast law firm, with extensive experience in large class actions. While my Firm and I most commonly appear representing corporate defendants in such actions, I want to make it clear that I am not a crusader against class actions. Indeed, class actions are an important way of correcting injustice and providing access to our judicial system for individuals whose claims may not rise to the level that would otherwise permit them to be redressed. Many meritorious claims are filed by competent and conscientious class counsel whose interest is to right actual wrongs and zealously pursue their clients' interests.

However, there are problems and abuses that sometimes do occur. In my role as counsel for a class in the case of *Kamilewicz* v. *Bank of Boston*, N.D. Ill. (No. 95–6341), which has become known in class action circles as the *BancBoston Litigation*, I experienced first hand some of the problems that need to be addressed. In the un-

derlying litigation, *Hoffman* v. *BancBoston Mortgage Corp.*, No. 91–1880 (Ala. Cir. Ct. Jan. 24, 1994), several hundred thousand people were certified as members of a nationwide class in a class action filed in state court in Mobile, Alabama, and had their rights adjudicated in Mobile through a settlement worked out and presented to the court by class counsel and defense counsel. Most of those 700,000 people received a minimal direct economic benefit; some received no direct benefit at all. Indeed, most had their mortgage escrow accounts, which were held by defendant Bank of Boston, deducted in order to pay several million dollars to the class counsel who had been approved to represent their interests. In short, having been included in a lawsuit they never envisioned, they had their own money from their own escrow accounts taken to pay class counsel for what many believe to have been a very dubious benefit.

Redress was sought on behalf of those class members in the *BancBoston Litigation*. Dexter and Gretchen Kamilewicz, citizens of Maine, and Martha Preston, a citizen of Wisconsin, filed that lawsuit on behalf of themselves and others who had been named as class members in the *Hoffman* case. Claims of malpractice and other wrongdoing were asserted against the counsel who has represented the *Hoffman* class as well as the Bank of Boston, which had agreed to the questionable settlement. The federal district court in Illinois determined that it did not have subject matter jurisdiction to redress the wrongs that had been done to the nationwide class members in the Alabama proceeding. Rather than reiterate at extended length here the tortured legal and economic history of those proceedings, I urge the Committee and its staff to review carefully the fine 1996 law review article written by Boston University Professor Susan Koniak and University of Virginia Professor George Cohen, entitled "Under Cloak of Settlement." It discusses the *Hoffman* and *BancBoston* litigations at length and analyzes thoughtfully many of the problems that occasionally give rise to abuse in class actions. The article also echoes some of the thoughts in my written submission and comments today.

The fundamental problem I have witnessed in class actions is that for certain unscrupulous plaintiff's counsel, Rule 23 has become a means of making a great deal of money without any accountability to clients. It is not the money with which I have a problem. It is the accountability—how to assure that the class members' interests are being placed first. The named class representative is usually a friend, sometimes a family member, but always on board with plaintiff's counsel. The other tens or hundreds of thousands of similarly situated plaintiffs have no relationship with their attorneys. The defendants and their counsel have a goal only of getting out of the case as quickly as possible and, if there is any legal merit to the claim, obtaining certification of as broad a class as possible so that the defendant will not be sued again with similar claims.

Both plaintiffs and defendant's counsel have a common goal—get rid of the case. The judge has a similar goal—get rid of the case. For unscrupulous class counsel and cooperative defense counsel the easiest way to get rid of a case early is (a) to give plaintiffs' counsel a great deal of money to go away, and (b) cooperate in describing to the court a class benefit that can pass the sniff test. If plaintiffs and defense counsel negotiate an agreement and come before a judge with a joint representation that they have reached a fair resolution for the class, most judges simply want to approve it. But if the class counsel in a particular case are interested more in their fees than in the merits of any recovery, who is representing their interests when the class members' rights are being adjudicated? Judge Easterbrook of the Seventh Circuit Court of Appeals, in a vigorous dissent that he, Judge Richard Posner, and others filed in the *BancBoston Litigation*, recognized the problem:

> "Representative plaintiffs and their lawyers may be imperfect agents of the other class members—may even put one over on the Court, a staged performance. The lawyers support the settlement to get fees; the defendants support it to evade liability; the Court can't vindicate the class's rights because the friendly presentation means it lacks essential information. This possibility, a staple of the literature about class actions, enjoys judicial recognition."

In cases brought by conscientious class counsel, and there are many, these problems do not arise. The class is adequately represented. But in reviewing Rule 23 in actual practice some questions must be asked: When abuse has taken place in a class action, what remedies can be provided to class members who have been subject to the abuse? May class members pursue claims of malpractice against their class counsel as a remedy for the occasional abuse case? What changes can be made to try and discourage class counsel from making collusive deals that have only their own economic interest at heart?

In my experience, the potential abuse is enhanced when cases are permitted to be brought in state court with nationwide jurisdiction over citizens of every state

then being granted. Judges in many state courts simply have less familiarity than the federal judges with large class action issues, the standards for protecting the class, and what their role must be in independently evaluating any proposed settlements. In short, they rely on the settlement deals being brought to them by plaintiffs and defense counsel which, for the reasons already mentioned, may sometimes not be in the best interest of the class.

In argument before the Seventh Circuit Court of Appeals in the *BancBoston Litigation*, counsel for one of the parties in the original *Hoffman* class action in Alabama state court was asked by Judge Evans to explain why the Bank of Boston would have been sued in a nationwide class action in Mobile, Alabama in the first place. The answer, quite candidly, helps illustrate the occasional abuse. I quote from the record.

> *Judge Evans:* "Let me ask you this before your light goes on because it's going to be on in a moment here. I'd like to follow up on the question I asked Mr. Farini. Does Bank of Boston have a lot of mortgages in Mobile, Alabama and how did they happen to get sued down there?"
>
> *Counsel:* "Well, they never quite know how it happened that they got sued in that jurisdiction. They could only surmise and if I could I could share their surmise with you which is not in the record but surmises that Alabama is a very friendly jurisdiction to class actions and to plaintiffs' classes in terms of the legal climate down there and that there are a lot of class actions brought in Alabama as opposed to other jurisdictions because of the perception, true or false by plaintiffs' counsel, it's a very good forum to go to."

There are occasional carefully reasoned opinions in state court class action matters, of course. I do not suggest every state court judge is overwhelmed by these proceedings or that right results do not usually occur. Indeed, I note a couple of examples to the contrary. Judge Edward McDermott, also of Mobile, Alabama, in another class action, rejected class counsel's effort to overvalue the benefit to the class and thereby obtain an inappropriate amount of fees from the class members' own bank accounts. In that decision, *Charles M. Law, et al.* v. *First Alabama Bancshares, Inc., et al.*, No. 90–003351 (Ala. Cir. Ct. October 3, 1995), Judge McDermott recognized:

> "The economic benefit of the settlement is not equal to the Settlement Proceeds because the escrow funds are already the property of the Class. The damage to the Class is merely the delay in receiving them while they are held by the mortgagor in the escrow account. The economic benefit of the new method of analysis adopted by settlement is the value of receiving the escrow funds now, rather than awaiting satisfaction of the mortgage. The witnesses acknowledged that there were some borrowers who would benefit from the settlement not because they received a refund, but because the amount of the deficiency in their accounts would be reduced and they would pay lower monthly payments to satisfy the lower deficiency. The Court finds that this is a benefit to the class that cannot be quantified for purposes of awarding an attorneys fee out of the escrow account refunds. Although there has been testimony from expert witnesses that there are other future benefits, these benefits are too vague and speculative to quantify for purposes of deducting an attorneys fee from them."

Also, the Honorable Jacqueline M. Koshian of New York Supreme Court, Niagara Falls, New York, threw out a proposed settlement entirely in *Mark J. LeRose* v. *PHH U.S. Mortgage Corporation*, Index No. 85444 (N.Y. Sup. Ct. August 9, 1997). She found, in pertinent part, as follows:

> "It is true that out of 140,000 borrowers only about twenty-seven opposed this settlement and it is also true that if each individual borrower were to bring litigation against the defendant, the actions would be complex and expensive. However, taking everything into consideration without reaching any ultimate conclusions on the issues of fact and law which underlie the merits of this dispute, this court does not find the proposed settlement agreement to be fair, adequate or reasonable."

However, it is rare that courts are able to go behind the negotiated settlements between plaintiffs and defendants and, in fact, determine that they do not benefit the class.

What should be considered:

1. At the least the notices sent to members of a class should tell the truth in clear language. We require under the law that warranties, warnings and other important public information be set forth in clear language—so should it be with respect to class action notices. I am sure that many of us in this room, including members of

the Committee, have received notices in the mail informing us that we are members of a class. Although I practice in this area, I have received notices that I am sometimes unable to decipher. I cannot determine for them what benefit, in fact, will accrue to me if I determine to stay in the class, nor can I determine what attorneys' fees will be awarded to the counsel who has decided to be my lawyers nor where that money will come from. This language is not always unintentionally vague. Rather, it is, I believe, sometimes intentionally vague so as to mask often staggering fee awards when compared to the comparable benefit to the class.

The notice in the *Hoffman* v. *Bank of Boston* litigation was a perfect example. It contained the usual language to the effect that if a member wishes to receive the benefits of class membership he/she did not need to do anything. It also represented that plaintiffs' counsel would seek attorneys' fees not to exceed one-third of the economic benefit. That, of course, was the rabbit in the hat, since the entire issue concerning that litigation was whether and to what extent, in fact, there was economic benefit bestowed on the class. Indeed, before finally agreeing to the settlement ultimately presented by both parties to the court for approval, the Bank of Boston had filed an objection to class counsel's proposed fee request on the grounds that most, if not all, class members would in fact lose money from the settlement if class counsel's fee request was approved. But if that is the truth they should be required to so state so that class members, armed with clear and complete information about what is happening to them and their rights, can decide whether to stay in or get out.

Class notices should be written in plain language. It is possible to tell class members clearly and simply what benefit they will receive, how much money class counsel will receive, and where that money will come from (from the defendant or out of the benefit being given to the class). Obfuscation in class notices is unnecessary and seeks to camouflage the sometimes excessive legal fees received by plaintiffs' counsel when only a minor benefit is being awarded to class members.

2. Capping of fees to class counsel is probably not the solution. The problem is in determining true value. Where unscrupulous counsel are involved the value can often be inflated, the defendants' counsel's interest is in getting the case settled for its clients and, therefore, not in jumping in to represent the class even they perceive that the fee is excessive to the actual benefit being given to the class.

3. Nationwide class actions should not be decided in state courts that often lack the experience and resources to assure that they are not being presented with a collusive settlement by plaintiffs and defendant, whose only interest is in getting the deal approved, regardless of its benefit to class members. Permit cases filed in state court that seek nationwide certification to be removed by defendants to federal courts. Where the rights of citizens across the country are being determined, the federal system should be in charge.

4. If a defendant chooses not to remove a case, class members should be able to challenge a settlement fee that they believe has deprived them of their rights without an adequate return. They should be able to pursue an action for malpractice against their class counsel without being barred by the underlying decision approving the class settlement. If class members have been defrauded by a notice, inadequately represented by their lawyers, they have not had meaningful notice or adequate representation. Fundamental federalism principles would seem to dictate that a state court issuing a judgment under those circumstances cannot, therefore, have jurisdiction to deprive non-residents of their state of such rights. We do not put at issue the finality of class actions because most settlements will be fair and, indeed, the fact that plaintiffs' counsel can be subject to having an unfair settlement attacked or subject to malpractice for selling out the class for a sweetheart deal simply increases the incentive for them to fairly represent their clients and obtain an adequate settlement for the class and reasonable attorneys' fees. It becomes a check against the abusive case.

5. Much like the self-executing disclosure now present in federal court civil litigation, class counsel should be required to disclose to any court where they seek nationwide certification (a) prior settlements in class actions and fees received by them, (b) any disciplinary actions to which they have been subject, and (c) any malpractice suits brought against them involving their role as class counsel. If class counsel is asking a court to certify that they are the proper lawyers to represent thousands of citizens across the country, the burden should be on class counsel to provide all pertinent information regarding their adequacy and to demonstrate that they warrant such an appointment. The burden should not be on defense counsel, through discovery, to try and find out such information when defense counsel's real goal is to get the case over—a result that may, in fact, be easier to accomplish with unscrupulous class counsel than with adequate class counsel.

In summary, the problem is not class actions per se or the pure dollar amounts that class action counsel sometimes receive. The problem is the potential abuse of collusive settlements where unscrupulous plaintiffs' counsel have commenced a litigation solely to obtain a large legal fee rather than to conscientiously pursue the real interests of the class. What should be addressed are ways to decrease the likelihood that those abusive situations will occur.

Thank you.

Mr. COBLE. Thank you, Mr. Wellington. Mr. Martin.

STATEMENT OF JOHN (JACK) W. MARTIN, JR., VICE PRESIDENT GENERAL COUNSEL, FORD MOTOR COMPANY

Mr. MARTIN. Thank you very much, Mr. Chairman, for inviting me to appear. At the conclusion of the first panel's appearance, Representative Canady called attention to Representative Moran's comments and asked each of the members of the panel whether they agreed that one of the solutions to the problem was to expand Federal diversity jurisdiction so that national class actions that were being filed in State courts could be removed to Federal court.

I think each and every member of the first panel agreed that this was a solution this committee ought to seriously investigate. That is the principle burden of the comments that I would like to make this morning in support of the committee's looking carefully at a reasonably limited expansion of Federal jurisdiction so that national class actions filed in State courts could be removed to Federal court.

There has obviously been a very large increase in the filing of class actions in recent years. We have certainly seen that in our experience. A majority of the cases, certainly in recent years, have been filed in State courts.

The reason for the increase is that even though the technical rules in the State courts are quite similar to the Federal rules, the State courts have been very lax in applying those rules. Indeed, in many cases, they do not even make a token effort to apply those rules. They just automatically certify the classes.

This is a matter for concern, not just because defendants are put to unreasonable expense in defending cases that ought not to have been filed as class actions, but also because it risks impinging upon the due process rights of the plaintiffs.

I would like to make very clear from the outset that I am not here to argue for any limitation on class actions or for taking any steps that would impinge upon the rights of consumers to have their grievances redressed.

My point is that we need a uniformed set of rules to deal with class actions. The Federal courts have shown themselves to be capable of dealing with this litigation in an expeditious and fair kind of way.

Obviously, there are issues to be addressed in the Federal system. But, in general, the Federal courts have shown themselves better able to deal with these cases than the State courts. Now, personally, my clients feel that many of these class actions that we are seeing these days are inappropriate, baseless claims.

Representative Conyers mentioned earlier our Bronco II experience and referred to the fact that a settlement that we had entered was not approved by a Federal court. I remember that situation very clearly.

I very reluctantly approved that settlement. I agreed with it because I felt it would provide some benefit to the customers of ours who were involved in that case, but none of the purported members of that class had been injured in any way or had any kind of a problem with their product.

Subsequently, the Federal court to whom that case was assigned refused to certify the case as a class action and has now dismissed most of the individual claims. I am confident it will ultimately dismiss all of the individual claims.

There is a separate action pending in State court in Alabama, which is currently on appeal to the Supreme Court in Alabama, but we intend to defend that litigation because it is brought on behalf of people who are quite satisfied with their products and have experienced no problem with them.

One of the serious problems with allowing national class actions to take place in State courts is that you have multiple lawsuits filed in State courts around the country on behalf of the same plaintiffs or the same purported class members with no mechanism in place to coordinate the litigation.

So, you can have several purported national class actions filed in several different State courts ostensibly on behalf of the same customers and no mechanism to coordinate that case, leaving you theoretically with the possibility of not only responding to multiple discovery, but ultimately multiple trials on the same causes of action and on behalf of the same plaintiffs.

In the Federal court we have a mechanism for coordinating this litigation through the multi-district panel and avoiding the specter of individual citizens, presumably being represented by different sets of lawyers in different courts around the country.

I think that is one of the major reasons for getting away from this situation we have today where a dispute between citizens of two different States involving $80,000 qualifies for removal to Federal court on grounds of diversity, but a national class action involving billions of dollars and millions of plaintiffs can be filed in a State court and there is no basis for removing it to Federal court. I think something has to be done about that.

[The prepared statement of Mr. Martin follows:]

PREPARED STATEMENT OF JOHN (JACK) W. MARTIN, JR., VICE PRESIDENT GENERAL COUNSEL, FORD MOTOR COMPANY

SUMMARY

The number of putative class actions filed against Ford Motor Company has skyrocketed. In 1990, only eight putative class actions were pending against the Company. Now, that number has swelled to more than 100. These figures are representative of the experiences of other U.S. companies, some of which report 300% to 1,000% increases in class action filings over the last three years.

This class action explosion results not from consumers demanding remedial action, but from plaintiffs' lawyers eager for large fee awards. Some attorneys scan newspapers and tabloid news shows looking for any controversy that would lend itself to a profitable class action. Then, they recruit acquaintances or advertise in newspapers in order to find named plaintiffs.

The dramatic increase in the number of purported class actions is largely a state court phenomenon. It is largely attributable to state courts that manifest a laissez-faire attitude about class actions, ignoring both the well-settled rules about which cases are appropriate for class treatment and the due process rights of class action defendants. For example, some grant class certification motions without even giving the defendant an opportunity to respond. Consumers, whose rights are supposed to

be vindicated in these cases, are victimized as well. They rarely receive substantial awards, while class action counsel (*i.e.*, their lawyers) frequently negotiate settlements under which they walk off with millions.

State courts are not the appropriate tribunals for many class actions, particularly those with interstate commerce dimensions. For example, many state court class actions involve class members from many different states. This results in the bizarre situation in which a state court in one state (*e.g.*, California) is interpreting the laws of another state (*e.g.*, New Jersey) and resolving the claims of its residents. Further, many state courts have neither the complex litigation experience nor the resources to deal with most class actions.

These abuses are much less prevalent in federal courts, which are a more appropriate forum for such disputes. Unfortunately, the parameters of federal diversity jurisdiction have been narrowed by Congress and the courts to exclude most class actions. Moreover, plaintiffs' lawyers, who prefer the "anything goes" class action environment that exists in some state courts, often join in-state defendants, "shave" the class claims, or engage in other subterfuges to prevent the removal of their cases to federal court. Congress should amend the diversity jurisdiction statute to prevent such manipulation and to give federal courts broader jurisdiction over more interstate class actions.

STATEMENT

I thank the Subcommittee for this opportunity to speak today about the serious abuses that are occurring in state court class actions.

Let me begin by sharing with you Ford Motor Company's recent experience with class actions, and in particular, state court class actions. What we are experiencing is typical of what other consumer product manufacturers (particularly motor vehicle manufacturers) are now facing.

A. The Proliferation Of Class Action Lawsuits.

In the last several years, the number of putative class action lawsuits filed against Ford has skyrocketed. In 1990, only eight putative class action lawsuits were pending against the Company. By the end of 1995, however, over 50 such lawsuits were pending, and by the end of 1997, that number had increased to over 100.

These figures parallel the surge in class action lawsuits that other companies are experiencing. Based on data from recent hearings, the Federal Judicial Conference's Advisory Committee on Civil Rules has observed that over the past three years, U.S. companies have experienced 300% to 1,000% increases in the number of purported class actions filed against them.[1] And a study by the highly regarded RAND Corporation confirms this trend.[2]

With the growth of class action lawsuits has come increased legal exposure to Ford (and companies like it). The types of legal claims asserted, the number of products and services at issue, and the amounts sought have all burgeoned. For instance, in 1996, a class action was filed against Ford purportedly on behalf of more than *23 million* vehicle owners (or almost nine percent of the population of the United States at that time). Lawsuits of this size are unprecedented in the history of Ford Motor Company. Not surprisingly, the amounts collectively demanded in these actions have also increased. It is no longer unusual for Ford to be served with a class action lawsuit seeking damages of a billion dollars or more.

B. The Erosion of Class Action Standards.

Given the immense stakes involved in these class actions against Ford, and the fact that the vast majority of named and unnamed plaintiffs live outside Delaware (where Ford is incorporated) and Michigan (where Ford is headquartered), one might think that these class actions would generally be filed and litigated in the federal district courts. After all, a core function of the federal courts is to adjudicate claims between the citizens of different states that involve substantial amounts of money. But the majority of class actions against Ford and other companies in recent years has been filed in *state* courts. The RAND Report notes that the "doubling or tripling of the number of putative class actions" has been "concentrated in the state courts."[3]

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[1] Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23, Vol. 1, at ix-x ("Working Papers 1") (memorandum to members of the Standing Committee on Rules and Procedure and the Advisory Committee on Civil Rules from Judge Paul V. Niemeyer).

[2] Deborah Hensler et al., Preliminary Results of the RAND Study of Class Action Litigation 15 (May 1, 1997) ("RAND Report").

[3] *See, e.g.* RAND Report, *supra* note 2, at 15.

The reason for this explosion of state court class actions is straightforward. State courts in a number of jurisdictions have exhibited a laissez-faire attitude toward class action lawsuits—that is, many local courts are willing to certify for class treatment cases that do not comport with the basic class action requirements.[4] Recognizing this opportunity, the class action plaintiffs' bar has "voted with its feet." They have taken their lawsuits to state courts that are less likely to exercise the rigorous case management that is necessary to (a) prevent the class action device from being used improperly against defendants and (b) ensure that all parties (including unnamed class members) receive due process. Indeed, some state courts actually have certified proposed classes identical to ones rejected outright by federal courts. Having discovered an open door in state courts, plaintiffs' counsel are filing class action lawsuits that they never would have attempted to bring just a few years earlier.

In interviews for the RAND Report, many attorneys (including some plaintiffs' counsel), observed that "too many non-meritorious [class action lawsuits] are [being] filed and certified" for class treatment.[5] As a result, corporations (both large and small) are being forced to expend substantial resources defending an onslaught of cases, most of which do not come close to satisfying the class action prerequisites. By readily obtaining certification of huge classes in state courts, plaintiffs' attorneys are able to create enormous financial exposure and to thereby force settlements of cases that otherwise would not be taken seriously.

C. Unwarranted Lawsuits Driven By Lawyers.

In many instances, the purported class actions that are being filed assert claims that are utterly without merit (or marginal at best). Many of these cases are driven solely by lawyers' desire to make money, not by real concerns expressed by real consumers. Plaintiffs' lawyers eager for large fee awards scan the newspapers and tabloid news shows looking for controversies that can be turned into class actions: debates about the utility of certain consumer products, corporate decisions that upset certain individuals or interest groups. Virtually every event in public life these days seems to become the subject of a class action lawsuit.

For example, within days after the fight in which Mike Tyson bit Evander Holyfield's ear, lawsuits were filed. These were not actions by Holyfield, the only person who really got hurt. They were class actions filed on behalf of pay-per-view cable television subscribers on the theory that they did not get their money's worth because the fight was cut short.

Another example is a case that was brought against Ford in New York state court by the Milberg Weiss firm, one of the better known plaintiffs' class action firms in the country. That case involved an honest mistake Ford had made—it had put a slightly overstated price on the window stickers for certain Ford Explorer vehicles it had sold.[6] As soon as we discovered the mistake, we began sending letters to our affected customers apologizing for the error and enclosing checks that more than compensated them for the pricing error. Nonetheless, fully knowing that this refund program was already well underway, Milberg Weiss filed a class action charging that Ford had committed fraud. Even worse, it asked the court immediately to enjoin Ford from continuing its refund efforts—presumably so that the plaintiffs' lawyers could get a cut of the refund money (even though they played no role in prompting that voluntary refund effort). In this case, the court properly dismissed the case. But it still required Ford to unnecessarily expend time and corporate resources on a lawsuit that clearly serves no legitimate purpose.

As further evidence of the contrived nature of these class actions, it should be noted that the named plaintiffs often are the lawyers themselves, their relatives, or their employees.[7] Or they are plaintiffs lured into a suit by an advertisement placed

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[4] At the same time, federal courts have laid down clearer, firmer rules governing when a matter may be afforded class treatment. The recent decisions of the U.S. Supreme Court in *Amchem Products* v. *Windsor*, 117 S. Ct. 2231 (1997), the Fifth Circuit in *Castano* v. *American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996), the Sixth Circuit in *In re American Medical Sys., Inc.*, 75 F.3d 1069 (6th Cir. 1996), the Seventh Circuit in *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir.) (Posner, J.), *cert. denied*, 116 S.Ct. 184 (1995), the Ninth Circuit in *Valentino* v. *Carter-Wallace, Inc.*, 97 F.3d 1227 (9th Cir. 1996), the Eleventh Circuit in *Andrews* v. *American Tel. & Tel. Co.*, 95 F.3d 1014 (11th Cir. 1996), all have been a much-needed breath of fresh air. In different ways and to varying degrees, they have reminded district courts of the importance of taking the requirements of Rule 23 seriously; that is, matters may be certified for class treatment only if they clearly meet the certification prerequisites set forth in Fed. R. Civ. P. 23.

[5] RAND Report, *supra* note 2, at 22.

[6] *See Faden-Bayes Corp.* v. *Ford Motor Co.*, Index No. 97–601076 (N.Y. Sup. Ct. County of New York) (filed Feb. 28. 1997). Ford's efforts to remove this case to federal court failed.

[7] For example, a lead named plaintiff in *Lewis* v. *Volvo of North America*, No. 96–19724 (Civil Dist. Ct, Parish of Orleans, Louisiana), an air bag-related class action originally filed in state

by lawyers urging them to let the lawyers file a lawsuit on their behalf. These purported "victims" of the defendant's misconduct typically neither know nor care much about the matters in these lawsuits.

D. Exploitation Of Consumers.

The real purpose of the vast majority of class action lawsuits is to make money—not for consumers, but for the lawyers bringing the suit. As a result, consumers often are exploited and rarely receive substantial awards, while class action counsel frequently walk away with millions. For instance:

- The *Baton Rouge (La.) Advocate* reported that in a settlement of a state court class action involving toxic pesticide fumes from a chemical plant, the residents of a New Orleans neighborhood each received a few thousand dollars. But the class action lawyers walked away with over *$25 million* in legal fees and expenses.
- An article in the *San Diego Union Tribune* criticized the settlement of a state court class action in which the author had received *93 cents* and her class counsel had received *$140,000.*
- The *Chicago Tribune* reported that one state court class action settlement with a mortgage bank yielded an *$8.5 million* payment to the class attorneys, but a *$91.33* debit to the class members' mortgage escrow accounts.

These reports are particularly disturbing because they reveal how grossly the class action device has been distorted. The class action device was intended to protect consumers. It was not created to enable lawyers to get rich.

Indeed, many of the lawsuits are so disingenuous that when consumers learn about the suits, many often want no part of them. For example, in the product liability arena with which Ford is most familiar, virtually none of the putative class members have actually experienced a tangible injury. Instead, the theory of the claim is that all purchasers of the allegedly defective product should be paid money today because there is a risk that their product may malfunction at some indefinite time in the future. Our experience has been that, on those occasions when the views of the absentee class members become known, many of them say that they want no part of the lawsuit and/or disagree with the allegations made therein.

E. Denials Of Due Process In State Court Class Actions.

Consumers are not the only parties being abused by class actions. As defendants in state court class actions, U.S. companies are being denied fundamental due process rights. Let me describe a few of types of problems defendants commonly incur in these courts.

Some state courts ignore the due process rights of out-of-state corporate defendants. In these jurisdictions, the defendant is not given a fair opportunity to contest the claims made against it. The most outrageous example of this is the "drive-by class certification" in which a state court judge grants plaintiffs' motion to certify his claims for class treatment *before* the defendant even has a chance to respond to the motion (or, indeed, has even been served with the complaint).

Ford has been a frequent victim of this practice. For example, in one lawsuit filed against Ford in a Tennessee state court,[8] the complaint was filed on July 10, 1996. Plaintiffs filed several inches of documents with their complaint. Astoundingly, by the time the court closed that same day, the judge had entered a nine-page order granting certification of a nationwide class of 23 million owners of Ford, Lincoln, and Mercury vehicles—one of the largest class actions ever certified by any court.[9] In the order, the court stated that it had conducted "a probing, rigorous review" of the matter. I am not sure how you could possibly do that in a few hours on the day a case is filed. And I am quite sure that you could not do "a probing, rigorous

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court, was the attorney who filed the lawsuit. The only named plaintiff in *Merrick* v. *Ford Motor Co.*, Case No. 9708–06079 (Ore. Cir. Ct. Multnomah County), a Citibank credit card-related class action originally filed in state court, was one of the attorneys who filed the lawsuit. A lead named plaintiff in *Gordon* v. *Ford Motor Company*, Index No. 104365/94 (N.Y. Sup. Ct. N.Y. County), was the spouse of the lead plaintiffs' counsel in the case. And the lead named plaintiff in *Landry* v. *Ford Motor Company*, No. 33255 (40th Jud. Dist., Parish of St. John the Baptist, Louisiana), a paint-related class action originally filed in state court, was the law partner of the lead plaintiffs' counsel in the action.

[8] *Sweet* v. *Ford Motor Company*, Civil Action No. L–10463 (Cir. Ct. for Blount County, Tenn.) (filed Jul. 10, 1996).

[9] *See* Order Granting Nationwide Class Certification, *Sweet* v. *Ford Motor Company*, Civil Action No. L–10463 (Cir. Ct. for Blount County, Tenn.) (filed Jul. 10, 1996).

review" when the defendant was never even notified about the lawsuit before that order was entered and was provided no opportunity to tell its side of the story.

When we checked on the class certification practices of this court, we found that Ford had not been the only due process victim. Only a few days earlier, the same plaintiffs' attorney had filed another multistate class action—that one alleging antitrust violations in the music/compact disc industry.[10] Once again, in that major class action, the trial court had entered an order granting class certification on the same day the complaint had been filed, long before the defendants were notified of the lawsuit and certainly before they had been afforded any opportunity to respond to the request for class certification.

Another common problem with state court class actions is the "I never met a class action I didn't like" phenomenon. Although most state courts will at least give the defendant a chance to respond to a class certification motion, many of them employ standards that are so lax that virtually every class certification motion filed is granted, even where it is obvious that the case cannot, consistent with basic due process principles, be tried to a jury as a class action. Here again, Ford has been a victim of this phenomenon.

In 1993, several purported class actions were filed against Ford alleging that Bronco II sport utility vehicles are "defective" because they are "unstable" (i.e., they may, under certain conditions, "roll over.") All but one of these lawsuits were removed to federal court and consolidated in the U.S. District Court for the Eastern District of Louisiana. After several years of discovery and motion practice, plaintiffs moved to certify a nationwide class action. Ford opposed that motion, and extensive briefing on the propriety of class treatment was submitted to the court. After consideration, the court denied the motion early last year. In a lengthy, thoughtful opinion that I commend to the Committee's attention, Chief Judge Sear identified a long series of reasons why trying the case as a class action would deprive both Ford and unnamed putative class members of their due process rights.[11]

Unfortunately, there was one Bronco II class action that did not make it to Judge Sear's court. That case, *Rice* v. *Ford Motor Co.*,[12] had been filed in Alabama state court by many of the same lawyers who were involved in the federal court proceeding. Ford removed the case (which was virtually identical to the others) to federal court, but it was remanded to the same Alabama state court. After Judge Sear denied class certification in the consolidated *Bronco II* cases, the Rice plaintiffs asked the Alabama state court to certify a class anyway. The judge granted their motion, issuing an order that completely ignored all the due process problems upon which Judge Sear's contrary decision was based.

The judge who granted class certification in *Rice* is well-known to those who practice on both sides of the class action bar. As was noted in a recent study conducted by Stateside Associates, that judge certified at least 35 cases for class treatment during 1996–1997, almost as many as were certified by all 900 federal trial court judges combined during calendar year 1997. And the Stateside researchers were unable to find any case in which the judge had ever denied class certification. In short, in this Alabama state court (and many others like it), the outcome of a class certification motion (no matter how flawed) is virtually a foregone conclusion, with little protection of defendants' due process rights.

F. Inadequacies Of State Courts As Arbiters Of Interstate Class Actions.

At bottom, state courts are simply not the appropriate tribunals for many class action lawsuits, particularly those with interstate commerce dimensions. In many (if not most) instances, state court class action cases involve putative class members from multiple jurisdictions suing defendants from outside the forum state. This engenders the bizarre situation in which a state court in one state (*e.g.*, California) is interpreting the state law of another (*e.g.*, New Jersey) and resolving the claims of New Jersey residents. What business does a California court have dictating to New Jersey what its laws mean and in resolving the claims of its citizens? This raises substantial federalism concerns.

Other state courts have adopted a different, equally unsatisfactory approach. They are applying their own state's laws to all claims asserted in a purported class action, even though the class is comprised primarily of out-of-state residents and even

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[10] *Robinson* v. *EMI Music Distribution, Inc.*, Civil Action No. L–10462 (Cir. Ct. of Blount County, Tenn.) (filed July 8, 1996).

[11] *In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, MDL No. 991, 1997 WL 86337 (E.D. La. Feb. 27, 1997).

[12] Civ. A. No. CV 93–065 (Cir. Ct. Greene County, Ala.) (filed Aug. 26, 1993).

though the laws of those class members' respective home states may be radically different.[13]

In addition to these problems, many state courts have neither the complex litigation experience nor the support staff necessary to address the complex, technical issues normally presented by class actions. And perhaps most importantly, they lack any mechanism for coordinating parallel litigation.

Constant certification of class actions in state courts subjects defendants to multiple lawsuits in different states based on the same facts and purported causes of action. Once one case is certified, plaintiffs' counsel in other states (who are often working in concert) often file "copycat" lawsuits in other states, and use the grant of class certification in the first state to bolster their case. Because state courts have no mechanism to consolidate cases, as do the federal courts, defendants are unfairly required to expend substantial resources defending multiple lawsuits. In such circumstances, there is no mechanism for achieving coordination and avoiding inconsistencies in results. Indeed, in some instances, the two state courts are forced to compete, each vying to control the litigation. Besides being wasteful, this situation is quite unfair, potentially giving the same classes several bites at the apple against s class action defendant.

If, however, overlapping or similar class actions are filed in two different federal courts, the multidistrict litigation process permits the transfer and consolidation of those cases for pretrial purposes, particularly the coordination of discovery. This is a much more efficient and effective system that does not needlessly waste judicial or corporate resources.

G. Use Of Manipulative Pleading Tactics To Evade Federal Jurisdiction.

The "anything goes" mentality in state courts has led to a sad reality: as a practical matter, the most important question determining the outcome of a class action lawsuit has now become, not the merits of the claims or the propriety of class treatment, but whether the case can successfully be removed to federal court. Because of the lackadaisical way in which some state courts treat class actions, a class action that stands virtually no chance of succeeding in a federal court can result in a multi-million (or billion) dollar judgment if it ends up in state court. Thus, the fight over the existence of federal jurisdiction becomes, as a practical matter, the whole ballgame.

The lawyers who file class action lawsuits recognize this. Accordingly, they have become increasingly adept at manipulating their pleadings to keep their putative class actions out of federal court.

For example, in some instances a complaint is filed that, fairly read, gives rise to a claim under some federal statute, thereby qualifying the case for the assertion of federal question jurisdiction. To disguise this fact, the complaint will omit any explicit reference to the federal claim, or may even expressly disclaim any intent to pursue an available federal claim.

On the diversity side, lawyers who want to keep a high-stakes class action out of federal court often manipulate the parties in an attempt to destroy complete diversity. Under traditional principles of diversity jurisdiction as applied to class actions, "complete diversity" exists only if the state of citizenship of all named plaintiffs is completely different than the state of citizenship of all named defendants. To destroy this, lawyers whose primary target is an out-of-state deep-pocket corporation sometimes name a token defendant who resides in the same state as one or more of the named plaintiffs. For example, a lawyer wanting to sue Ford in Texas state court may name as a co-defendant a Texas-based employee of Ford, or a Ford dealer located in Texas.

The inherently fraudulent nature of this tactic is obvious: although all putative class members may have bought a Ford vehicle (and therefore may conceivably have a claim against Ford), few (if any) of the putative class members had any dealings with the token in-state defendants, meaning that a classwide judgment against these defendants is impossible. As all parties recognize, Ford is the only real target of the lawsuit. The in-state defendants are there only to facilitate the remand of the sction to state court on the basis of the "absence of complete diversity." Once the jurisdictional battle is over, these defendants usually fall by the wayside.

Alternatively, lawyers sometimes include on the *plaintiffs'* side of the case a named plaintiff who lives in the same state as the defendant. Thus, Ford has been served with a complaint in Alabama state court which purports to be brought by three Alabama residents and one Michigan resident. Again, the manipulative intent here is clear. Why would a Michigan resident who has a grievance against a Michi-

[13] *See, e.g., Snider* v. *State Farm Mut. Auto. Ins. Co.*, No. 97–C–114 (Ill. Cir., Williamson Co.) (order certifying nationwide class of state-law based claims).

gan-based company travel all the way to Alabama to file her lawsuit? Obviously, the reason is that her lawyers are trying to prevent Ford from defending against this inherently nationwide controversy in a federal court.

The "amount-in-controversy" prong of the federal diversity requirement also is the subject of frequent manipulation. The U.S. Supreme Court's decision in *Zahn* v. *International Paper*[14] has been interpreted as holding that, in a putative class action, the "jurisdictional amount" requirement (now $75,000) is met only if each and every putative class member's individual claim is worth that amount. Exploiting this general rule, class action complaints often declare over and over again that all putative class members seek less than the jurisdictional amount (sometimes $74,999).

In recent years, some exceptions to the basic *Zahn* rule have developed. For example, some federal courts of appeals have held that class actions that seek punitive damages in excess of the jurisdictional amount may meet the amount-in-controversy requirement.[15] In response, class action complaints now purport to "waive" any and all claims that might conceivably give rise to a punitive damage award (or at least limit punitive damages to a lesser amount).

These kinds of "claims-shaving" tactics raise disturbing issues of adequacy-of-representation and due process. While a single plaintiff suing solely in his own name surely is the "master of his complaint" and may limit the claims he asserts or the relief he seeks in order to stay in state court, a litigant (and his counsel) who seeks to represent large numbers of other people in a class action is constrained by his fiduciary obligations to the absentee members of the class. As several courts have recognized, it is inherently improper for a class action lawyer to unilaterally "waive" otherwise available claims that absentee claimants might wish to assert simply in the name of forum-shopping.[16] Nevertheless, it happens every day—class counsel sacrifice the claims of unnamed class members in order to keep their cases in state courts.

Clever lawyers can exploit still other tricks to deprive an out-of-state class action defendant of its right to defend itself in a federal forum. For example, under current law, *all* defendants must consent to the removal of a case to federal court. If one defendant objects, the case cannot be removed. Accordingly, plaintiffs' lawyers sometimes join a "plaintiff-friendly" person or entity as a defendant, with the understanding the nominal defendant will use his status to veto any removal attempt.

Another abuse stems from the requirement that any lawsuit be removed to federal court within one year after its "commencement." Lawyers sometimes quietly file putative class actions in state courts that have no deadline for providing service, and then decline to serve the defendant until the one year deadline has expired. Alternatively, they include statements in their complaint designed to insulate the case from removal (such as assertions that only a nominal per-claimant amount is sought), wait one year, and then file an amended complaint that raises the amount-in-controversy or eliminates other impediments to removal only after the one year deadline has expired.

These pleading tactics (and others like them) invariably are employed in purported class actions that, by virtue of the inherent diversity of the real parties in interest and the amounts actually at stake, ought to be litigated in federal court. They are complicated lawsuits that require the substantial resources and expertise that the federal courts are uniquely situated to devote to them (and that state courts, which spend most of their time handling smaller matters, are not institutionally well-suited to handle). They are also lawsuits that present exceedingly high-stakes for the defendant, and therefore give rise to the risks of parochialism and prejudice that the federal court system is designed to prevent (but that, regrettably, infect some state court systems).

These types of pleading tactics are intended to disguise the inherently federal character of these lawsuits. They elevate the deliberately manipulated "form" of the lawsuit over its actual substance. They ought not be allowed. Many class actions—truly large cases with interstate commerce implications—plainly belong in the federal courts. Accordingly, I urge this Subcommittee to consider revising the diversity jurisdiction statute (28 U.S.C. § 1332) and the case removal statutes (28 U.S.C. §§ 1441, 1446) as they relate to class actions, to ensure that putative class actions that properly belong in federal courts are in fact brought in (or are readily removable to) federal courts.

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[14] 414 U.S. 291 (1973).

[15] *See Tapscott* v. *MS Dealer Serv. Corp.*, 77 F.3d 1353, 1359 (11th Cir. 1996).

[16] *See, e.g., Epstein* v. *MCA, Inc.*, 126 F.3d 1235 (9th Cir. 1997); *Ex parte Russell Corp.*, 1997 WL 641325 (Ala. Oct. 17, 1997).

Conclusion

Without question, state court class actions now loom as substantial litigation threats to Ford Motor Company and other U.S. corporations, large and small. For this reason, curbing state court class action abuses should be a major legislative priority. The trends were are experiencing and the abuses we are being forced to undergo should not be permitted to continue.

Once again, I thank the Committee for its attention, and for the attention it is devoting to the problem of abuses of the class action device. I look forward to working with you to develop a comprehensive congressional solution to this problem that will ensure that the class action device is used only for legitimate purposes.

Mr. COBLE. Thank you, Mr. Martin. Mr. McGoldrick.

STATEMENT OF JOHN L. MCGOLDRICK, SENIOR VICE PRESIDENT FOR LAW AND STRATEGIC PLANNING AND GENERAL COUNSEL, BRISTOL-MEYERS SQUIBB COMPANY

Mr. MCGOLDRICK. Thank you, Mr. Chairman. I thank the committee for inviting me here today. I was reflecting that I got out of law school in 1966 when this rule first came into effect.

I have spent much of 30 years since then as a lawyer arguing about class actions in the courts, occasionally writing about them, and now as a client living with them. I have seen them work well and I have them abused.

In my short time today, I would like to make two points; one with respect to diversity jurisdiction reform, and perhaps a brief comment, if there is time, on class action settlements.

It might be well at the beginning for me to disclose to you my perspective. First of all, I am not one who believes that class actions are the devil incarnate. They have an important place in our jurisprudence.

They can provide a way to bring justice in sets of claims where justice could otherwise not be provided. On the other hand, those who say there has been no or little abuse in the last 10 to 20 years, I think can hardly have been fully awake.

There has been great abuse. I would comment there has been much talk of collusive settlements and we must do what we can to root them out.

I would mention, as well, that there is an implacable and quite terrible arithmetic for defendants in the frivolous class actions. Not all class actions are frivolous. When they are, and when the chance of losing the case is as small as 2-percent or 3-percent, it is a lead pipe winner, but nonetheless, damages are so huge by reason of the aggregation of claims, there is a very powerful arithmetic and incentive toward settlement. It is truly a form of blackmail. So, the frivolous claim issue is real.

I personally believe that mass torts are generally inappropriate for the class action treatment. That may be more to chew off than we can this day, but I do hold that view. There may be some. There are some. Perhaps the airplane crash. I think we have gone far afield from what those who framed this rule in 1966 thought the world would be like. Let me address quickly my two points.

Diversity reform; we have seen, and in submissions to you, you have reports on the change, the rather abrupt change in the filings in State courts as opposed to Federal courts. Candidly, I would suggest to you that the reason for that is fairly clear.

The kind of abuse that there has been much inveighing against today here—quite properly—we have seen the Federal courts have started to move against at various levels. This has caused attorneys, who know on which side their bread is buttered, to seek out, often in State courts, judges who are compliant with easy certification of classes that should not be certified and perhaps of settlements which are collusive.

We should not demean the State judiciaries too much. There are many State judges and many of them are excellent. There are so many of them and so many of them do not have experience with the class action, that it is a very different world. Those who bring class actions know which judges to go to. The Federal courts in general have done much better. Before an experienced, respected, independent, Federal judge who is not elected, a Judge Pointer in Alabama, a Judge Weinstein in New York, or Former Judge Lacey, the class action abuses do not occur.

I return to Congressman Conyers' point that the good discretion of a judge goes a long way in ending abuse. I think a great step, if a small step, but still a great step would be if this committee could consider legislation which would let national class actions, which do truly affect interstate commerce in a serious way, be brought in the Federal courts.

I would urge that you should do that.

Briefly, my red light is on—Mr. Chairman, my last point would be simply that with respect to the collusive class action settlements which need to be dealt with, the discretion of a good trial judge is probably the best remedy. An Internal Revenue Code of regulations, highly detailed, for dealing with them, I think, is something that nobody should want. It benefits no one.

I do think that, that discretion soundly applied, if that is the antidote, is best attained through a diversity type statute which will bring the settlements before a Federal judge. It is very important that we not throw out the idea of being able to settle class actions.

When they are brought, many times they should be settled. We should not be chained to going to trial, in the interest of everyone, including the class. That should be administered by an impartial Federal judge, I submit.

Brevity is virtue. I shall cease.

[The prepared statement of Mr. McGoldrick follows:]

PREPARED STATEMENT OF JOHN L. MCGOLDRICK, SENIOR VICE PRESIDENT FOR LAW AND STRATEGIC PLANNING AND GENERAL COUNSEL, BRISTOL-MEYERS SQUIBB COMPANY

SUMMARY

Especially in recent years, the class action device has experienced serious abuse, often with the perverse result that companies that have committed no wrong find it necessary to pay ransom to plaintiff's lawyers because the risk of attempting to vindicate their rights through trial simply cannot be justified to their shareholders. Too frequently, corporate decisionmakers are confronted with the implacable arithmetic of the class action: even a meritless case with only a 5% chance of success at trial must be settled if the complaint claims hundreds of millions of dollars in damages.

As other witnesses presumably will discuss in some detail, class action abuses are most pervasive in state courts. In some places, state court judges do not appreciate the raw power of the class action device and the need to circumscribe its usage. As

a result, the rights of both defendants and the class members on whose behalf the actions were brought get ignored.

This situation is quite ironic because the history of the U.S. Constitution makes clear that interstate class actions are the paradigm for the kind of dispute that should be subject to federal diversity jurisdiction. Yet, although federal courts presently are empowered to hear what are basically small, local disputes, statutory restrictions on federal diversity jurisdiction prevented federal courts from adjudicating most class actions. For example, if I have a $76,000 dispute with a contractor in a neighboring state, I could present that dispute for resolution by a federal court. But a $2 billion motor vehicle defect dispute between 100,000 vehicle owners residing in all 50 states and a California-based manufacturer generally would no be subject to federal diversity jurisdiction. The frustrations created by these restrictions are exacerbated by the fact that there is presently confusion among our federal courts about which purported class actions are subject to federal diversity jurisdiction.

Congress should consider legislation that would generally permit federal courts to hear class actions with interstate commerce implications. Expanding federal court jurisdiction in this fashion would strongly promote the three goals the framers of the Constitution sought to achieve in establishing diversity jurisdiction in the first place: (a) to foreclose locality discrimination; (b) to prevent bias against interstate commercial enterprises; and (c) to enhance public confidence in the judicial system.

STATEMENT

I appreciate the opportunity to participate in the Subcommittee's discussion today on mass torts and class actions.

My views on class actions have been formed by more than 30 years spent as a private practitioner defending such cases on a variety of subjects, including mass tort, product liability, employment, and securities suits. More recently, my responsibilities as Senior Vice President and General Counsel of the Bristol-Myers Squibb Company have caused me to consider not only the legal, but also the business consequences of the class action device.

I. The Existence Of Class Action Abuse Is Indisputable.

It is clear beyond peradventure that the class action device has experienced serious abuse, often with the perverse result that companies that have committed no legally cognizable wrong find it necessary to pay ransom to plaintiffs' lawyers because the risk of attempting to vindicate their rights through trial simply cannot be justified to their shareholders. All too frequently, corporate decisionmakers are confronted with the implacable arithmetic of the class action: even a meritless case with only a 5 percent chance of success at trial must be settled, from the defendant's point of view, if the class complaint alleges hundreds of millions of dollars in damages. Only recently have some courts realized how radically a decision to certify a class changes the dynamics of a lawsuit. As Chief Judge Posner of the U.S. Court of Appeals for the Seventh Circuit has observed, the mere issuance of an order certifying a case for class treatment "often, perhaps typically, inflict[s] irreparable injury on the defendants." [1]

Despite this, I know there are some who still question whether there is any real "abuse" of the class action. From personal experience, I can tell you there is. I personally have sat in corporate boardrooms and seen senior management of major American companies make the decision—after shaking their heads in disgust at the legal system—to pay what amounts to blackmail in order to settle truly meritless lawsuits. Often, this decision is made shortly after the company's lawyers have informed these senior executives that the chance of a judgment for the plaintiffs on the merits of the case is quite small. This compounds the irony, and the social wastefulness, of the executives' frequent decision to pay large sums to settle class actions instead of using the money for research, product development, employee benefits, or other more socially useful purposes.

Sometimes, of course, large companies choose to litigate class actions vigorously. But this decision is very costly as well, and often is only made after a company's management decides there are non-monetary concerns that require the company to fight the class allegations against it. For example, manufacturing companies with outstanding reputations for quality may also choose to litigate rather than settle class actions because the perceived blemish on their reputation may exceed, in non-monetary terms, the risk-adjusted cost of taking their case to a jury.

[1] *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1295 (7th Cir. 1995).

Whether companies choose to settle or to litigate class actions, the result is basically the same: a wealth transfer from American business to American lawyers, often with little countervailing benefit to society. When companies pay ransom to settle meritless class actions—as they clearly do—they spend money that could have been applied to more socially useful purposes. When companies pay to litigate class actions, they spend far more money than it would take to defend the few arguably meritorious individual cases on which the class action is based. In either case, "abuse" occurs in a very real sense.

II. The Root Cause Of Most Class Action Abuses Is The Absence Of A Federal Forum.

A. Class Action Abuses Are Most Pervasive In State Courts.

I do not say to you today that the federal judiciary has been perfect in its management of purported class actions or that there is no need for reform at the federal level. But the stark reality is that the vast majority of class action abuse happens in cases pending before *state* courts.

I will not enumerate those abuses here; my understanding is that other witnesses will be providing this Subcommittee will provide ample evidence in that regard. But there is one piece of data that most clearly confirms where the problem resides. In recent months, both the Advisory Committee on Civil Rules and the Institute for Civil Justice have highlighted evidence (a) that a tidal wave of new purported class actions is hitting corporate defendants[2] and (b) that this tidal wave is has been concentrated in state courts, not federal.[3]

This onslaught of new class actions is not occurring because of a sudden erosion of corporate morals. And this tidal wave is not being confined to state courts merely because their clerks' offices are more conveniently located or charge lower filing fees. Instead, this phenomenon is attributable to a relatively small cabal of plaintiffs' lawyers who have simply discovered that many state courts will give them carte blanche to wield the class action bludgeon to coerce settlements, even though the lawsuits are frivolous or do not resemble a real class action.

In my view, the root cause of much current class action abuse is that these purported cases simply do not belong in state courts. Make no mistake. There are many superb state court judges. However, for whatever reason, there are state court judges in some places who do not appreciate the raw power of the class action device and the need to limit its usage to cases in which the aggregated processing of claims is necessary and can be achieved without jeopardizing the due process rights of any party, plaintiff or defendant. These judges are well known to and beloved by the ring of plaintiffs' lawyers who have become among our nation's richest citizens by exploiting the class action device. As a result, some of these courts have ignored the rights of not only defendants, but also the unnamed class members on whose behalf the claims were supposedly asserted. Moreover, in many instances, the state courts simply do not have the resources and experience necessary to manage these highly complex cases in a professional manner.

B. Interstate Class Actions Are The Paradigm Case For Federal Diversity Jurisdiction.

Without question, most of these purported class actions are precisely the kinds of cases that the framers of our Constitution had in mind when they established the concept of federal diversity jurisdiction. Indeed, the notion that class actions with interstate commerce implications should be heard in our federal courts (whenever a plaintiff or a defendant so desires) is strongly indicated by all three rationales underlying the diversity jurisdiction concept:

- *Foreclosing Locality Discrimination*—In large part, diversity jurisdiction was established by the framers of our Constitution to guard against locality discrimination; that is, to protect the citizen of one state from the biases that might be engendered in litigating a case in the courts of a different state.[4] As James Madison put it, diversity jurisdiction is essential to our federal constitutional scheme because "[i]t may happen that a strong prejudice may arise in some state against the citizens of others, who may have claims against

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[2] Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23, Vol. 1, at ix-x (May 1, 1997) ("Advisory Committee Working Papers") (memorandum of Judge Paul V. Niemeyer to members of the Advisory Committee on Civil Rules).

[3] Deborah Hensler, *et al.* (Institute for Civil Justice), Preliminary Results of the RAND Study of Class Action Litigation, at 15 (May 1, 1997) ("ICJ Report") (observing that the "doubling or tripling of the number of putative class actions" has been "concentrated in the state courts").

[4] *See* Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 Harv. L. Rev. 483 (1928).

them."[5] Or as Justice Frankfurter stated, "It was believed that, consciously or otherwise, the courts of a state may favor their own citizens. Bias against outsiders may become embedded in a judgment of the state court and yet not be sufficiently apparent to be made a basis of a federal claim."[6]

This anti-discrimination principle was so important to our constitutional framework that even though there apparently was no concrete evidence of such state court bias in 1787, the framers established diversity jurisdiction as a prophylactic measure to ensure that such bias would never occur.[7] They sought to prevent even the perception of bias because they feared that if litigants believed they had suffered discrimination, they would develop prejudices against other states, thereby destroying the federal comity principles upon which our Union is founded.[8] Thus, while it was important to the constitutional structure to protect state sovereignty, the framers also recognized that such protections could not be absolute; in cases involving citizens from different states, litigants needed broad access to the federal courts.[9]

- *Prevention Of Bias Against Interstate Commercial Enterprises*—Diversity jurisdiction was also intended to ensure that perceived state biases against commercial enterprises did not create a climate that would stymie the expansion of commercial and manufacturing interests throughout the country, thereby undermining the forging of a national union.[10] Our founders correctly envisioned the evolution of a Union with large commercial enterprises spanning many states—a future that they believed would be threatened by local courts that might be hostile to such entities. It was thus important to have a fair, uniform, and efficient forum for adjudicating interstate commercial disputes so as to create an environment that would nurture commercial expansion. Federal courts were seen as not only more efficient than state courts (and thus better able to adjudicate complex commercial disputes[11]), but also fairer.

  The framers recognized that federal courts had greater institutional competence than state courts to protect individual rights and adjudicate complicated commercial disputes with integrity and fairness,[12] in part due to the life tenure and salary protection that shields Article III judges from political pressures.[13] Indeed, the framers correctly predicted that in many jurisdictions, state court judges would be elected and therefore subject to a need to satisfy local political interests.[14] The framers' fear of state court discrimination against out-of-state business entities was fueled by the general insularity

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[5] *Id.* at 492–93.

[6] *Burford* v. *Sun Oil Co.*, 319 U.S. 315, 316 (1943) (Frankfurter, J., dissenting on unrelated grounds).

[7] James William Moore & Donald T. Weckstein, *Diversity Jurisdiction: Past, Present and Future*, 43 Texas L. Rev. 1 (1964).

[8] *See, e.g.*, Adrienne J. Marsh, *Diversity Jurisdiction: Scapegoat of Overcrowded Federal Courts*, 48 Brooklyn L. Rev. 197, 201 (1982).

[9] "However true the fact may be, that tribunals of the states will administer justice as impartially as those of the nation, to the parties of every description, it is not less true, that the constitution itself either entertains apprehensions of this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between . . . citizens of different states." *Bank of United States* v. *Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809) (Marshall, C.J.).

[10] Moore & Weckstein, 46 Texas L. Rev. at 16.

[11] *See* John P. Frank, *Historical Bases of the Federal Judicial System*, 13 Law and Contemp. Probs. 3, 27 (1948); *see also* John J. Parker, *The Federal Jurisdiction and Recent Attacks Upon It*, 18 A.B.A. J. 433, 437 (1932) ("No power exercised under the Constitution . . . had greater influence in welding these United States into a single nation [than diversity jurisdiction]; nothing has done more to foster interstate commerce and communication and the uninterrupted flow of capital for investment into various parts of the Union, and nothing has been so potent in sustaining the public credit and the sanctity of private contracts.").

[12] *See, e.g.*, Burt Neuborne, *The Myth of Parity*, 90 Harv. L. Rev. 1105, 1121–29 (1977).

[13] *See* Moore & Weckstein, 43 Texas L. Rev. at 22. In this regard, one constitutional scholar—Martin Redish—has drawn an analogy between judges and baseball umpires. He argues that if baseball umpires were subject to the same kinds of political pressures as elected state court judges, nobody would trust them to call balls and strikes. *See* Martin H. Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. Rev. 329, 333–34 (1988); *see also* Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Rule 23, Vol. 4 (May 1, 1997) (comments of consumer advocate Stephen Gardner) (highlighting "the inconvenience" and the uncertainty of dealing with local practice in a variety of state courts, where the Good Old Boy system frequently prevails").

[14] In 38 states, judges are subject to some form of election, a process that increases the risk of political pressure and favoritism. *See* Erwin Chemerinsky, Federal Jurisdiction § 1.5, at 34 (2d ed. 1994).

of state courts from the national system and the fact that state legislatures had enacted debtor relief and other measures that generally favored individuals (at the expense of business interests).[15] Diversity jurisdiction, the framers believed, was needed to ensure that disputes between individuals and corporations from different states could be litigated in a fair and protective environment—federal court. Thus, diversity jurisdiction was intended to be a levelling device, designed to shield litigants from the insularity of state court systems and to put all litigants on a more equal footing.[16]

- *Enhancement Of Public Confidence In The Judicial System*—Diversity jurisdiction was also premised on a belief that predictability of judicial process and safeguards against local court idiosyncracies and biases were key to developing confidence in our justice system. As I noted in an article published almost twelve years ago, diversity jurisdiction "has heightened [the] confidence of the citizenry in the fairness of the judicial system. We need to feel the umpire is not a 'homer,' and diversity helps."[17]

  For this reason, federal courts were vested with authority over not only federal questions, but also disputes between citizens of different states that were likely to present issues of interstate import. Consistent with this purpose, federal courts have developed broad and deep substantive knowledge—that is, a strong understanding of the laws of the various states—and widely respected procedural protections. In particular, federal courts (unlike their state counterparts) have the ability to consolidate complex litigation arising in multiple jurisdictions in a single district.[18]

As has been detailed by other witnesses, state court class action defendants are routinely facing the kind of "locality discrimination" (*e.g., ex parte* class certification orders) that motivated the creation of diversity jurisdiction. Corporate defendants in those cases most assuredly are also being victimized by prejudices against out-of-state business entities and the perceived ability to secure monetary awards without injuring local interests. And there is no question that state court handling of purported class actions—particularly the tendency of many to certify classes regardless of whether applicable prerequisites have been satisfied,[19] the willingness of many to approve settlements that benefit only the class attorneys,[20] the appetite of many to interpret the laws of other, distant jurisdictions and to resolve the claims of out-of-state residents, and the fervor of many to advance cases that "compete" with previously filed actions in federal or other state courts[21]—are seriously eroding public confidence in our judicial system.

C. The Present Definitions Of Diversity Jurisdiction Irrationally Excludes Many Interstate Class Actions.

Everything about state court handling of interstate class actions cries out for ensuring that such cases are heard by federal courts. Yet, we presently have a bizarre regime under which I, as a New Jersey citizen, could have a $76,000 house remodeling dispute with a New York-based contractor that would be heard in federal court. At the same time, however, a federal court could well be without authority to hear a $2 billion motor vehicle defect dispute between (a) 100,000 vehicle owners with $20,000 claims residing in all 50 states and (b) the California-based manufacturer. Astoundingly, that dispute could be heard only in a state court!

How could our judicial resources be so irrationally allocated? It's all because in enacting 28 U.S.C. § 1332, Congress decided to limit federal diversity jurisdiction in a manner that (as interpreted by our federal courts) is producing rather strange re-

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[15] *See* Friendly, 41 Harv. L. Rev. at 495–97.

[16] *See* Frank, 13 Law and Contemp. Probs. at 27–28.

[17] John L. McGoldrick, *The Federal Experiment at 200: On Diversity Jurisdiction, the Constitution and Federalism*, New Jersey Lawyer, Summer 1987, at 39, 40.

[18] *See, e.g.*, 28 U.S.C. § 1407. Not only do state courts lack the authority to consolidate cases, but they have demonstrated little self-restraint in addressing claims that have already been asserted in a different forum. *See, e.g.*, Marcel Kahan and Linda Silberman, *Matsushita and Beyond: The Role of State Courts in Class Actions Involving Exclusive Federal Claims*, Advisory Committee Working Papers, Vol. 2, at 412.

[19] *See* Advisory Committee Working Papers, Vol. 3, at 39 (testimony of Lewis Goldfarb, Chrysler Corporation) (noting the "huge shift" of class actions into state courts "where the judges . . . almost see it as their civic duty to certify classes").

[20] See Lawrence W. Schonbrun, *The Class Action Con Game*, Regulation, Fall 1997, at 50.

[21] *See* Advisory Committee Working Papers, Vol. 3, at 32 (statement of Prof. Samuel Issacharoff, University of Texas School of Law) (noting that "rival state court proceedings in class actions are "emerging as real problem spots"); *id.*, Vol. 4, at 88 (comments of consumer advocate Stephen Gardner) (describing the duplication of rival state class action proceedings in state and federal courts).

sults. Section 1332 limits federal diversity jurisdiction to cases in which two requirements are satisfied:

- *First*, there must be *"complete diversity"*—that is, federal jurisdiction exists only if no plaintiff shares state citizenship with any defendant. The U.S. Supreme Court has ruled that in purported class actions, satisfaction of this "complete diversity" requirement is determined by looking only at the named plaintiffs and defendants; the citizenship of the unnamed members of the putative classes are ignored for purposes of this analysis.[22] Nevertheless, in an effort to keep their cases in the more favorable state courts, class action plaintiffs' counsel often name extra parties to "destroy" diversity and prevent removal of the purported class action to federal court.[23]
- *Second*, the dispute must be of substantial value. At present, the statute tests this point by requiring that the *amount in controversy* must be greater than $75,000. And as is discussed further below, the general rule is that in a purported class action, this amount-in-controversy requirement must be satisfied by each and every individual class member or the entire case is outside federal jurisdiction. Again, counsel frequently try to plead around this requirement in order to keep their case in state court. For example, counsel frequently plead that their case is *not* worth more than $75,000 (even when it arguably may be so for some putative class members) to avoid removal of their state court class action to federal court.[24] Ironically, even when some or all of the claims of individual class members are in fact not worth $75,000, the aggregated value of the claims of all members of the class (which often number in the thousands or millions) is enormous.

Congress has full authority to change these restrictions to permit a broader array of class actions to be filed in or removed to federal court. For example, consistent with the Constitution's authorization of federal court diversity jurisdiction, Congress could authorize federal courts to hear purported class actions that satisfy a "minimal diversity" requirement—that is, cases in which at least some members of the purported class are citizens of jurisdictions different than some defendants.[25] And Congress is entirely free to remove or alter the jurisdictional amount requirement for class actions.

D. At Present, There Is Confusion About Which Purported Class Actions Are Subject To Federal Jurisdiction.

Regardless of whether Congress ultimately decides to make broad changes in the diversity jurisdiction prerequisites for class actions, there is at least a need for clarification of its intent regarding the existing rules. This is because federal courts are

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[22] *See Snyder* v. *Harris*, 394 U.S. 332, 340 (1969) (in a class action brought under Fed. R. Civ. P. 23, only the citizenship of the named representatives of the class is considered, without regard to whether the citizenship of other members of the putative class would destroy complete diversity).

[23] For example, counsel sometimes name in-state defendants that are only tangentially related (if at all) to the controversy and that are certainly not necessary for the fair adjudication of the case. In other instances, counsel seek out and name a plaintiff who shares citizenship with the defendant (even though the case involves a purportedly nationwide class and a resident of any other jurisdiction could have been named as a plaintiff).

[24] On this point, it is important to note that the current removal statute contains a major loophole that is a source of substantial abuse. Under 28 U.S.C. § 1446(b), a defendant may remove a state court class action to federal court only during the first year after the action is commenced. In my experience, it is a common practice for class action plaintiffs to limit their relief demands in the initial complaint to avoid federal jurisdiction. Once the one-year removal period has expired, however, these limitations are removed; by amendment, counsel demand relief in excess of the diversity jurisdictional amount threshold. Through this tactic, a defendant is denied the opportunity to remove a case to federal court, even though it fully satisfies tho diversity jurisdiction prerequisites.

[25] Article III requires only that the controversy be "between citizens of different states." The Supreme Court has observed that "in a variety of contexts, [federal courts] have concluded that Article III poses no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as any two adverse parties are not co-citizens." *State Farm Fire & Cas. Co.* v. *Tashire*, 386 U.S. 523, 530–31 (1967) (citations omitted). On several subsequent occasions, the Court has reiterated its view that permitting the exercise of federal diversity jurisdiction where there is less than complete diversity among the parties is wholly consistent with Article III. *See, e.g., Newman-Green, Inc.* v. *Alfonzo-Larrian*, 490 U.S. 826, 829 n.1 (1989) ("The complete diversity requirement is based on the diversity statute, not Article III of the Constitution."); *Owen Equipment & Erection Co.* v. *Kroger*, 437 U.S. 365, 373 n.13 (1978) ("It is settled that complete diversity is not a constitutional requirement."). *See also Carden* v. *Arkoma Associates*, 494 U.S. 185, 199–200 (1990) (O'Connor, J., dissenting) ("Complete diversity . . . is not constitutionally mandated.")

split on an important question: under what circumstances does a purported class action satisfy the requisite amount-in-controversy threshold for removing an action to federal court under a diversity jurisdiction theory?

In two landmark decisions, the Supreme Court held (a) that the question whether a purported class action satisfies the amount-in-controversy requirement should not be determined by aggregating the apparent value of the claims of all of the different class members, *see Snyder* v. *Harris*, 394 U.S. 332 (1969), and (b) that the requirement is satisfied as to a purported class action only if each and every member of the purported class is shown to satisfy the jurisdictional amount threshold (currently $75,000) individually. *See Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973). In recent years, however, federal courts have struggled to apply the *Snyder* and *Zahn* holdings, resulting in a number of inconsistent federal court decisions on the increasingly critical question of when purported class actions may be removed.

First, federal courts have disagreed on the precise scope of the Snyder decision. Although the Supreme Court stated in *Snyder* that each putative class member generally must meet the amount-in-controversy threshold before a purported class action may be removed, the Court also stated that when "two or more plaintiffs unite to enforce a single title or right in which they have a common and undivided interest," the amount in controversy is the total dollar figure in which they have an undivided share. *See Snyder*, 394 U.S. at 355.

Of late, federal appellate courts have expressed conflicting views about when plaintiffs' claims should be deemed to represent a "common and undivided interest" under *Snyder*, such that the putative class members' claims may be aggregated. Some circuit courts now hold that in certain circumstances, a defendant's potential liability for punitive damages or injunctive relief may represent a "common and undivided interest" that may be considered in the aggregate in determining whether a purported class action meets the amount-in-controversy requirement.

With respect to punitive damages, these courts reason that such damages are intended not to benefit the individual plaintiff but rather to punish the defendant for its behavior toward the class as a whole. Thus, according to these courts, the putative class members have a common interest in the punitive damages, making aggregation appropriate under the reasoning of *Snyder*.[26] Other courts have rejected that conclusion.[27]

Similarly, with regard to injunctive relief, some federal courts have recognized that a defendant's cost of complying with an injunction sought by a purported class may not vary depending on how many persons are in the class, suggesting that under *Snyder*, the purported class has a "common and undivided interest" in the injunctive relief. For example, if a purported class sues to force a company to conduct a $1 million campaign publicizing a safety risk posed by a product, the cost will be the same regardless of whether there are 10 or 10 million people in the purported class, strongly suggesting that the relief sought is not separate and distinct for each individual class member. Thus, some courts have held that the cost of the injunctive relief sought may be considered in the aggregate in determining whether the amount-in-controversy requirement is satisfied.[28] Other courts have declined to accept such reasoning.[29] Indeed, in those circuits that do not allow aggregation of

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[26] *See Allen* v. *R & H Oil & Gas Co.*, 63 F.3d 1326, 1335 (5th Cir. 1995) (punitive damages are "fundamentally collective" under Mississippi law and can thus be aggregated for purposes of removal because each plaintiff has "an integrated right to the full amount"); *Tapscott* v. *MS Dealer Serv. Corp.*, 77 F.3d 1353, 1359 (11th Cir. 1996) (punitive damages claims under Alabama law should be aggregated for purposes of removal because the purpose of such damages is deterrence—not compensation—making them "a single collective right in which the putative class has a common and undivided interest").

[27] *See, e.g., In re Brand Name Prescription Drugs Antitrust Litig.*, 1997 U.S. App. LEXIS 22267, *26 (7th Cir. 1997) ("the right to punitive damages is a right of the individual plaintiff, rather than a collective entitlement of the victims of the defendant's misconduct"); *Gilman* v. *BHC Securities, Inc.*, 104 F.3d 1418, 1430 (2d Cir. 1997) (punitive damages must not be aggregated for purposes of removal unless the underlying claim asserts a single title or right); *Haisch* v. *Allstate Ins. Co.*, 942 F. Supp. 1245, 1250 (D. Ariz. 1996) (refusing to aggregate punitive damages in insurance case because the right to punitive damages is held individually by each member of the class).

[28] *See, e.g., Loizan* v. *SMH Societe de Microelectronics*, 950 F. Supp. 250, 254 (N.D. Ill. 1996) (allowing removal of class action in which plaintiffs sought injunction requiring defendants to inform all watch owners of possible radiation, because cost to defendants of complying with injunction would exceed amount-in-controversy threshold); *Earnest* v. *General Motors Corp.*, 923 F. Supp. 1469 (W.D. Ala. 1996) (denying motion to remand products liability case to state court even though plaintiffs explicitly limited compensatory and punitive damages claims to less than $50,000; compliance with plaintiffs' request for injunction that would include vehicle recall and advertising campaign would clearly exceed the amount-in-controversy requirement).

[29] *See Packard* v. *Provident Nat'l Bank*, 994 F.2d 1039, 1050 (3rd Cir. 1993) ("allowing the amount in controversy to be measured by the defendant's costs would eviscerate *Snyder's* hold-

punitive damages or injunctive relief, federal courts often remand purported class actions posing millions of dollars in exposure on the theory that with regard to each individual plaintiff, there is less than $75,000 in controversy.[30]

Second, as the Fifth and Seventh Circuits have recognized, the *Zahn* ruling was partially overturned by the 1990 enactment of 28 U.S.C. § 1367, which on its face allows a class action to be removed to federal court via supplemental jurisdiction if at least one named plaintiff can demonstrate claims in excess of the $75,000 minimum.[31] However, several courts have rejected the notion that section 1367 establishes supplemental jurisdiction for class actions, citing legislative history that contradicts the plain meaning of the statutory language. In these courts, defendants must demonstrate that each individual member of the class has claims exceeding $75,000 in order to remove the class action to federal court.[32]

In sum, there is significant disagreement about when a high-exposure, interstate class action may be removed to federal court. This disagreement is heightening the stakes for defendants that are forced to defend complicated, nationwide litigation in state courts. It has also led to increased frustration among both judges and litigants who face increasing uncertainties in attempting to interpret the federal jurisdictional statutes applicable to purported class actions.

When discussing the increasingly rampant abuses of the class action device, there is a tendency in some quarters to blame those abuses on the device itself. Without question, there is a need to make some adjustments based on our thirty-two years of experience operating with the current class action model (as established by the current Fed. R. Civ. P. 23 in 1966 and subsequently embraced in some form by most state courts). But a significant cause of abuse is that class actions—lawsuits that are the largest, most complex disputes in our judicial system and that typically have substantial interstate commerce implications—should not be relegated to the jurisdiction of state courts. For the protection of both the unnamed class members on whose behalf such actions are brought and the defendants who must cope with the potentially ruinous, in *terrorem effects* of the class action device, Congress should develop means to correct this serious problem.

Mr. COBLE. Well, even though I have harped on and on about the red light, no one has been a flagrant abuser. So, nobody is going to be keel hauled today.

Thank you, Mr. McGoldrick. Ms. Cabraser.

STATEMENT OF ELIZABETH J. CABRASER, ESQ., LIEF, CABRASER, HEIMANN, AND BERNSTEIN, LLP

Ms. CABRASER. Thank you, Mr. Chairman. Thank you for the opportunity to address the subcommittee today.

I think I am the only person speaking to day that has worked largely on the plaintiffs' side in class actions over the past 20 years.

What has fascinated me about the testimony today is that despite the fact that you are hearing from all sides of the controversy,

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ing that the claims of class members may not be aggregated in order to meet the jurisdictional threshold").

[30] *See, e.g., Prescription Drugs Antitrust Litig.*, 1997 U.S. App. LEXIS 22267.

[31] *See In re Abbott Labs.*, 51 F.3d 524, 529 (5th Cir. 1995) (under plain language of 28 U.S.C. § 1367, a district court can exercise supplemental jurisdiction over members of a class even though they did not meet the amount-in-controversy requirements, as long as tha class representatives did meet that requirement); *Stromberg Metal Works, Inc.* v. *Press Mechanical, Inc.*, 77 F.3d 928, 930–31 (7th Cir. 1996) (same).

[32] *See, e.g, Crosby* v. *America Online, Inc.*, 967 F. Supp. 257, 263 (N.D. Ohio 1997) (supplemental jurisdiction is not appropriate in class actions because "the *Zahn* rule has continued vitality, even after the passage of the amendments to 28 U.S.C. § 1367"); *Mayo* v. *Key Fin. Servs., Inc.*, 812 F. Supp. 277, 278 (D. Mass. 1993) (same). Even those courts that recognize the import of 28 U.S.C. § 1367 on class actions disagree about applying that provision in particular cases. For example, at least one court has held that the potential liability for attorneys' fees can be attributed to one plaintiff for purposes of meeting tha amount-in-controversy threshold, and that the rest of the class can then be brought into federal court under § 1367's supplemental jurisdiction. *See In re Abbott Labs*, 51 F.3d 524 (5th Cir. 1995). But that view has not been adopted by other federal courts. *See, e.g., In re High Fructose Corn Syrup Antitrust Litig.*, 936 F. Supp. 530 (C.D. Ill. 1996) (remanding antitrust case to state court after refusing to apply the reasoning of *Abbott Labs* to request for attorneys' fees).

no one has advocated that class actions be limited in any serious way.

I do not think anyone would dare to advocate that. I think there is a universal recognition of the importance of the class action mechanism in our civil justice system. It is one of the mechanisms that we have that is a truly American mechanism.

While there may have been and there may continue to be some abuses in its name, no one is urging sweeping reform or any real limitation to the access of the American people to the use of this mechanism.

Rather, the concern is to make sure that this mechanism continues to serve the legitimate interests of our citizens. That is a concern that is shared by everyone on the plaintiffs' and defendants' side.

We differ in terms of where the problem is, where it came from, how large it is, and perhaps what to do about it. But I think there is a basic consensus that the worst thing that could possibly be done to respond to any crisis or abuse, real or perceived, would be to hamper the range and the scope of the class action mechanism.

I do share the views, surprisingly enough, of many of the other speakers today with respect to some specific matters that would improve the ability of class actions to deliver efficiency, economy, and consistency of result to the public and to litigants.

That is what Americans want. All too often our civil justice system is too slow, too costly, too difficult to understand. Class actions have a unique role and opportunity to play in changing that, because class actions are public litigation

Class actions affect the rights and interests of many people at one time. There is a tremendous opportunity for the courts and lawyers to do their jobs to make the system understandable to the people.

I have to say something in defense of our State courts because they have come under attack today. The love of justice and the courage to do justice is found in small towns, as well as large cities.

It is not sufficient to criticize a class action or a class action lawsuit by remarking that it occurred in a small town that was hard to fly to. I was a participant in the class action that was mentioned by Professor Koniak, the Polybutylene Pipe case; a hard fought case in Orion County, Tennessee.

Why was it brought in Tennessee? The plaintiff lived in Tennessee and her pipes leaked and her house was damaged. Through her efforts, a nationwide class of millions of homeowners received cash benefits of over $950 million; the largest settlement of that type in any Federal or State court; a settlement which received the widespread support of the class members, and the public, and public interest groups like the Trial Lawyers for Public Justice.

What were the lawyers' fees? For the class action lawyers, they worked out to about 5-percent. If that case had been done on a private contingent fee basis, most people would never have recovered.

The contingent fees would have ranged from a third, to 40-percent, or maybe 50-percent. The transaction costs would have eaten up the benefits and there would have been no ability of the civil justice system to deliver a great benefit to so many.

That was done in State court. It could have been done in Federal court. I think much of the confusion and lack of consistency that is currently troubling practitioners, and judges in the class action area could be addressed through the exploration, the very thoughtful exploration of legislation that would increase Federal diversity jurisdiction so that more class action litigation could be brought in the Federal courts; not because the Federal courts necessarily have superior judges, but because the Federal courts have nationwide reach.

They have the statutory mechanisms that they need to manage this litigation. So, litigation can be transferred and coordinated in a single forum. One thing not mentioned in my written statement that I would like to bring to the subcommittee's attention today because it occurred just this Tuesday, was a ruling by the U.S. Supreme Court in a case called *Lexecon* v. *Milberg Weiss*.

The Supreme Court ruled that under the Federal multi-district litigation statute, 28 U.S.C. 1407, transferee courts to whom many cases are transferred for pre-trial purposes can no longer transfer those cases to themselves for trial.

That had been the practice in most multi-district litigation. Cases could be tried, or settled, or disposed of in a single transferee court. The remedy to that Supreme Court decision is fairly simple, very simple.

In fact, the Supreme Court has invited Congress to act by amending 28 U.S.C. 1407 to incorporate the Federal Judicial Panel on Multi-District Litigation's own rule, Rule 14(b), back into the statute so that Federal courts to whom many cases, including class actions, are transferred from around the country can keep those cases for purposes of unitary settlement or trial.

That would work in the mass tort area, as well as the consumer area. It is specific legislation like that, that would do much to solve most of the problems we are seeing today.

Otherwise, Rule 23 does not need to be changed. The system works. The courts have equity jurisdiction. Most judges are very serious about laying down the law in class action to prevent abuses.

If they are able and encouraged to do that by the type of legislation that is being suggested today, I think we will see in only a very few years the things that trouble us about a few class actions will subside, and the class action mechanism will fulfill its potential to serve the American people.

[The prepared statement of Ms. Cabraser follows:]

PREPARED STATEMENT OF ELIZABETH J. CABRASER,[1] ESQ., LIEF, CABRASER, HEIMANN, AND BERNSTEIN, LLP

SUMMARY

- Class actions will continue to play a vital role in protecting investor, consumer, employee, and civil rights in the increasingly complex society of the 21st Century.
- The modern class action is a uniquely American contribution to the civil justice system and embodies inherently American ideals of equal access, justice, fair play, efficiency, and economy.

[1] Ms. Cabraser is a partner in the San Francisco law firm of Lieff, Cabraser, Heimann & Bernstein, LLP. She served as counsel of record in the *Exxon Valdez*, *General Motors*, *Castano*, *Naef* v. *Masonite*, *Breast Implants*, and *Cox* v. *Shell* cases mentioned in this Statement.

- Principles of federalism require deference to the substantive laws of the states, but the courts may apply uniform procedural rules, including class action procedures, to preserve the due process rights of all litigants, to expedite unitary adjudication of common issues, and avoid judicial congestion in the mass tort context.
- Class actions have moved to state courts because the federal courts have arguably abdicated their leadership role in class actions and complex litigation management: a role for which the federal courts are ideally suited and to which they should return.
- Our citizens require, and deserve, the renewed leadership of the federal courts in the increased use of class actions in consumer litigation, and the judicious application of class action techniques to common issues in mass tort litigation.
- Further revisions to Federal Rule 23 are unnecessary. The Supreme Court's *Amchem* decision provides detailed guidance for the certification and settlement of class actions. The federal courts have the inherent authority and equity jurisdiction to preside over nationwide class actions; should retain the discretion to certify common issues of law and fact for class treatment while reserving other issues (such as specific causation and damages) for individual adjudication; and possess the statutory and procedural tools they require to manage class actions fairly and efficiently.

STATEMENT

Good morning, Honorable Chairman and members of the Subcommittee on Courts and Intellectual Property. I am pleased and honored to have the opportunity to address you today on the important role of class actions in preserving and protecting the civil and consumer rights of Americans in our increasingly complex society, the state of class action jurisprudence and perception today, and improvements that will assure that the class action continues to fulfill its purpose in our new century. Our federal courts have had, and should continue to have, a pivotal role in the development, utilization, and control of the class action procedure. There have been notable, and successful, examples of the innovative use of class action techniques in mass tort litigation, and there has been criticism of the application of class actions to mass torts. The federal courts must be encouraged, and assisted by appropriate legislation and rules, to continue their leadership in class action jurisprudence, and to continue the creative application of class action procedures in mass tort cases, if the goals of the American equity class action—access, efficiency, equity, consistency of adjudication, and finality of judgment—are to be realized.

My involvement with class actions began as a young lawyer in 1978. Over the years I have participated in the litigation, settlement, trial, and appeal of class actions in the federal and state courts, in the areas of securities and investment fraud, civil rights, employment discrimination, antitrust and consumer litigation, as well as the product defects, environmental disaster, and personal injury cases sometimes called "mass torts." I have served by Court appointment as class counsel for plaintiffs in over 100 successful class actions, and the representation of plaintiff classes in complex civil litigation has been a continuing theme of my practice and that of my firm. I have been an advocate of class actions because I have learned that class action procedure best serves and promotes the interests of those I serve. My clients have been men and women from all walks of life and all parts of the country who needed to take action to protect their rights, their jobs, their property, their savings, or their local environment; or who simply sought fair compensation, in their lifetimes, for injuries or losses from defective or dangerous products. The class action delivered on the promise of access to the courts when a common catastrophe, product, practice, or course of conduct impacted many people in similar ways, and when individual litigation was too expensive to the litigants, or too burdensome on the court system, to be feasible.

My professional involvement in class actions, in conjunction with my academic interests as an amateur legal historian, has led me to study the origin and evolution of class actions in our American court system with an emphasis on the policies and values class actions embody and promote, the continuing legitimacy and necessity of these values in American life and commerce, and the debate over whether the class action mechanism would benefit from procedural changes or statutory reforms.

Class Actions and the Primacy of Equity

Although the procedure we now call class action had its origins in medieval England, it was the work of American courts and legislatures that developed the class action we know today, as a powerful tool of equity jurisdiction, and a uniquely American institution. In the mid-19th Century, Justice Story's groundbreaking work in equity jurisprudence, and the legislative response to the increasing complexity of

society, commerce and industry established the class action procedure in essentially the form we know today. In fact, modern corporations and modern class actions were born and grew up together, as 19th Century legislation provided for the modern corporate form of business organization to facilitate the accumulation and deployment of capital.[2] Modern corporations and class actions were both creatures of state legislation, and fortuitously provided a check-and-balance system between corporate power and investor, employee and consumer rights that we still use today.

The modern corporate form of business organization has enabled the United States to achieve and maintain supremacy as an economic power, and has provided for its citizens a standard of living never before known. At the same time, a judicial mechanism was needed to address the inevitable tension and potential inequality between corporations, as legal "persons" of vast wealth, perpetual existence, and attendant economic and political power and influence, and human individuals, subject to injury, and consigned to mortality. Equity, as implemented under the class action rules, has evolved to embody three distinct, and distinctly American principles: (1) efficiency and economy in judicial administration; (2) universal access to civil justice; and (3) empowerment of small claimants to achieve equality between human and corporate persons. Each of these principles is invoked and reaffirmed in the Supreme Court's recent *Amchem* decision as the class action's continuing mandate:

> *the [Federal Rules] Advisory Committee had dominantly in mind vindication of "the rights of groups of people who individually would be without effective strength to bring their opponents into court at all."* . . .
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> *The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor."* *Mace* v. *Van Ru Credit Corp., 109 F.3d 338, 344 (1997). 117 S. Ct. at 2246.*

As the 20th Century has progressed, the advent of mass marketing and mass advertising, and advancements in technology, mechanization, and computerization have eclipsed traditional, local, one-on-one business, commercial and employment relationships. Most of the time, most of us have benefitted from the advances and achievements of business and industry. Its efficiencies and economies of scale have transformed, largely for the better, our lives and work. But these same efficiencies have enabled the perpetration of investment frauds, the marketing of substandard or dangerous products, and resort to overcharging, false advertising and other deceptive business practices on a mass scale never before imaginable.

In a justice system without a class action heritage, such schemes would be unstoppable, because the cost of litigation erects economic barriers to the courts. Our system, wisely, does not subsidize civil litigants. It is, for the most part, a "user pays" system. In the traditional civil case, the merits of a plaintiff's case, and the prospects of substantial compensation if the case is proved, creates the necessary incentives for wronged litigants to invoke the system and maintain order and confidence in our society by redressing private wrongs.

However, when a small wrong is committed that affects many people, none of them may have a sufficient amount at stake to justify individual litigation, and a wrongdoer may profit hugely, and with impunity, by conducting a fraudulent or deceptive scheme comprised of numerous and recurring small transgressions. While such conduct imposes only a small amount of damage on the individual level, it impacts many people, and is precisely the type of conduct that erodes public trust and confidence in our systems of business, government, and adjudication. As the California Supreme Court observed a generation ago, in a case that established the rights of consumers in class actions, *"if each is left to assert his rights alone, if and when he can, there will at best be a random and fragmentary enforcement, if there is any at all. The end result is not only unfortunate in the particular case, but it will operate seriously to impair the deterrent effect of the sanctions which underline much contemporary law."* *Vasquez* v. *Superior Court*, 4 Cal.3d 800, 807 (1971)

We are a nation of laws, not of men; and all persons (corporate and human) stand equal before the law. Class actions were thus a self-consciously corrective measure, borrowed from equity and applied to suits at civil law, and employed to counteract the tendency of economic power to confer practical immunity from the rule of law. In modern American society, it was perceived that a civil justice system that did

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[2] *See, e.g.*, Handlin & Handlin, "Origins of the American Business Corporation," 5 J. Econ. Hist. 1, 10 (1945); Presser, *Piercing the Corporate Veil* (Clark Boardman Callaghan 1994, 1997) §1.02.

not adjust to correct the prejudicial ramifications of the inequality between company and individual, actively promoted injustice. As the federal courts confidently and unapologetically observed from the 1940's through most of the 1980's,

> *The class action was an invention of equity, mothered by the practical necessity of providing a procedural device so that mere numbers would not disable large groups of individuals, united in interests, from enforcing their equitable rights nor grant them immunity from their equitable wrongs.*

Montgomery Ward & Co. v. *Langer*, 168 F.2d 182 (8th Cir. 1948).

The existence and the utilization of the class action promotes the regulatory, deterrent, and compensatory goals of the civil justice system by providing a cost-effective mechanism to challenge and redress such wrongdoing. The class action is a powerful tool of private enforcement far preferable, less intrusive and more efficient to the alternative of pervasive government controls. Its existence and utilization encourages corporations to compete in conformance with quality and fair play, and enables the law-abiding to conduct their business *without* the impediment and cost of increased government supervision and regulation, which would impose a daily burden and penalty of cost and inconvenience on all businesses, regardless of fault. That is why, throughout this century, in good and bad economic times, during periods of liberal and conservative ascendency alike, our Supreme Court has repeatedly asserted the need for the class action mechanism:

> *The justifications that led to the development of the class action include the protection of the defendant from inconsistent obligations, the protection of the interests of absentees, the provision of a convenient and economical means of disposing of similar law suits, and the facilitation of the spreading of litigation costs among numerous litigants with similar claims.*
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> *United Parole Commission* v. *Geraghty*, 445 U.S. 388, 402–03 (1980).
>
> *The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremediated by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.*
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> *Deposit Guaranty National Bank* v. *Roper*, 445 U.S. 326, 339, *rehearing den'd*, 446 U.S. 947 (1980).
>
> *Class actions also may permit the plaintiffs to pool claims which would be uneconomical to litigate individually . . . this lawsuit involves claims averaging about $100 per plaintiff; most of the plaintiffs would have no realistic day in court if a class action were not available.*
>
> *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 809 (1985).

The Supreme Court has recognized and endorsed the policy that Rule 23 enables private citizens and their counsel as private attorneys general to fill gaps in government regulatory activity by redress, in group fashion, of those wrongs which individual citizens would not dare or could not afford to tackle through individual litigation. "Rule 23 of the Federal Rules of Civil Procedure provides for class actions that may enhance the efficiency of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture." *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 266 (1972). In short, Rule 23 sought to provide, *de jure*, natural persons with the same access to, and procedural power in, civil litigation that corporations had enjoyed *de facto*. With class actions, investors, consumers, employees and others were to have access to a level playing field on which to seek the meaningful judicial determination of the merits of their claims.

When we think of class actions today, we think of Federal Rule 23, which is a codification of basic equity concepts, and is a successor to the old Federal Equity Rule 38, which provided simply: *"when the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole."* Equity jurisdiction exists to provide the courts with the flexibility they need to do justice and insure fairness in a particular case when the law prescribed in statutes and case law is sufficient. As Justice Storey reminds us, "In this sense equity must have a place in every rational system of jurisprudence, if not in name, at least in substance. It is impossible that any code, however minute and particular, should embrace or provide for the infinite variety of human affairs, or should furnish rules applicable to all of them" Story, *Commentaries on Equity Jurisprudence*, § 7 (1884). Accordingly, our federal courts, and most state courts, possess both equity and legal jurisdiction to enable them to do justice in an ever-changing world. Class actions

have long been an essential part of this equity jurisdiction.[3] It is thus ironic that modern class action jurisprudence has become bound up in increasingly technical interpretations of Rule 23 of the Federal Rules of Civil Procedure, which was itself an attempt, through codification, to provide more specific guidelines and formulae for the exercise of an inherently equitable jurisdiction. When Rule 23 is read literally, uninformed by its historical and essential equitable context, inconsistent and unsatisfactory results can occur, and the fundamental purposes and policies of the class action can be lost. For the most part, this has not happened; but when it has, public frustration has been the result. The response has been to criticize the class action mechanism itself, or to urge its restriction, or even its abolition, in an age in which the need for a vital and flexible class action mechanism is greater than ever.

Class Action Use or Abuse?

Is the class action too powerful? Certainly, it enables groups of individuals, similarly aggrieved, to band together for the purpose of common and representative litigation. This can make the plaintiff as a group, for a specific purpose and for a finite period far more powerful than they would be alone, and nearly as powerful, in terms of procedural rights, as the corporate defendant they challenge. But this simply levels the playing field, and provides both sides with equal access to the courts, so that the plaintiffs have the opportunity of meeting their burden of proof on the merits. The stakes in class action litigation can be extremely high, but this is a function of the magnitude of the conduct or wrongdoing at issue in the lawsuit. Without a class action, a defendant's potential exposure will never equal the measure of its wrongdoing; with the class action, such proportionality is at least possible. Those who argue for restriction or elimination of the class action are seeking an inequitable and unconscionable form of immunity from the consequences of their own decisions and actions, and the maintenance of an imbalance of power that is antithetical to American democratic principles. This nation believes in individual responsibility and accountability; the class action mechanism extends such accountability to corporate, as well as individual citizens.

The recent attacks mounted against class actions have come not because class actions are inherently abusive, or have been "abused" by plaintiffs or practitioners, but because they have threatened to fulfill their *intended* purpose in reducing the ability of corporate defendants to insulate and immunize themselves from accountability to the public through exploitation of the benefits of concentration of capital, diffusion of personal responsibility, and perpetual existence. By aggregating claims and authorizing their pursuit through committed representatives, the class action mechanism offsets the advantages of corporate wealth and power.

Class actions promote efficiency, economy, and consistency of result in our court system. Americans are justifiably frustrated with the costs, delays, and unpredictable outcomes of individual litigation. When the court system reacts to multiple injuries or losses involving the same product or course of conduct by insisting upon repetitious individual litigation that clogs the courts, creates interminable delay, and produces wildly divergent results, the system loses public confidence and its own credibility. When thousands of similar claims compete for limited court resources, plaintiffs with meritorious claims may die before they obtain their day in court. Unremitting transaction costs, and the distractions of defending unending litigation on multiple fronts, drives companies into bankruptcy and disrupts the economy. The burden on the courts themselves takes its toll on judicial and staff resources and wastes taxpayer money. An increasingly cynical public sees the lawyers on both sides, who either work for hourly fees regardless of the outcome, or stand to win huge contingency fees if they prevail, as the only winners in such a system. This image of large scale litigation is not entirely accurate, but it is the perception of a large portion of the public, and it erodes the image of the American justice system. The class action offers a critically needed procedure solution that maintains the balance of the substantive rights of the parties.

The answer to the mass litigation cases is *not* to further restrict access to the courts by erecting additional barriers to individual litigation, or by restricting class actions. A public that perceives itself as deprived of access to the courts is powerless to provide a check against corporate misconduct, large-scale or petty fraud, or care-

[3] In *Wood River Area Development Corp.* v. *Germania Federal Savings and Loan Association*, 198 Ill. App. 3d 445, 555 N.E. 2d (Ill. App. 1990), the Illinois Court of Appeals drew direct parallels between the original groups whose rights were adjudicated in English equity practice, "rural tenants and landlords, parishioners and parsons," and the masses of average Americans who depend on them today: *"No matter how refined, how revised, or how evolved this flashy import becomes, the goal of the class action remains the same—justice for the lowly, the tenants, the parishioners, the multitudes."* 198 Ill. App. 3d at 448.

less manufacturing or business practices. When thousands or millions of consumers are overcharged for products or services, when they buy products that do not work, or that injure their consumers, millions of dollars are lost that could have been used for savings, for legitimate investments, or to purchase worthwhile products and services. Good businesses are paralyzed and good business practices become uncompetitive when bad practices and bad products go unchecked. Government enforcement can never be a complete answer, even if businesses and consumers would stand for it; such enforcement rarely is focused on, or succeeds in, pursuing compensation for those damaged or injured.

The decades-long asbestos litigation stands as a tragic example of the consequences of failure to utilize the class action mechanism, at the earliest stages of the litigation, to afford compensation to present victims while avoiding multiple bankruptcies and court bottlenecks. Early advocates of asbestos class actions, including some federal judges, were ignored. The litigation establishment perceived the class action mechanism as a last resort, rather than an early solution, to the asbestos litigation which, unchecked and largely unadjudicated, ultimately spread to virtually every federal and state docket in the country. Thousands of claimants died, and continue to die, without compensation. Scores of companies have gone bankrupt. The Judicial Panel on Multidistrict Litigation has described asbestos litigation as a "lottery," rather than a fair and functional system for adjudicating claims and distributing compensation. When the class action mechanism was finally used in the asbestos litigation, it was, in the view of the United States Supreme Court, used improperly, to foreclose the future claims of those with non-manifested injuries without providing them the notice or due process that the class action, equity and the Constitution require.

Had the class action been embraced at an earlier stage of the asbestos litigation, it could have been used, consonant with equitable and class action principles and Constitutional due process rights, to provide a system for compensation of present injuries, conserving sufficient assets and insurance to provide for future claims if and as they arose. Notably, in rejecting the end-game futures-only asbestos class action settlement in *Amchem Products, Inc.* v. *Windsor*, ____U.S.____, 117 S. Ct. 2231 (1997), the United States Supreme Court reaffirmed, in ringing terms, the necessary and essential role class actions must continue to play where large numbers of small claims, recurring misconduct, or other problems beyond the effective scope of individual litigation are involved.

Rule 23: Is It Broke? Can (or Should) We Fix It?

For the past several years, the Federal Rules Advisory Committee has subjected Rule 23 of the Federal Rules of Civil Procedure to intense scrutiny, debating and disseminating a variety of proposed amendments designed to address contemporary problems and issues in class action jurisprudence. At one point, the Advisory Committee had, under active consideration, an amendment that would have eliminated one aspect of Rule 23 that has generated endless debate and litigation. Rule 23 provides for three subspecies of class actions under Rule 23(b)(1), 23(b)(2), and 23(b)(3), which require the trial courts to determine whether, under particular formulae, class actions should be "mandatory" or whether class members should be allowed to "opt out." Generally speaking, "mandatory" classes have been utilized under 23(b)(1) and (b)(2) when primarily equitable or injunctive (non-monetary) relief is at stake, and these provisions have been widely used in employment and civil rights cases. Rule 23(b)(3) was thought to be reserved for damages classes, and much of the litigation and controversy that has plagued the courts has involved 23(b)(3) classes, as the Supreme Court recently observed in *Amchem*, 117 S.Ct at 2245.

The amendment under consideration by the Advisory Committee would have given trial courts broader discretion to determine, in any type of class action, whether the particular circumstances called for a mandatory class, an opt-out class, or even an "opt-in" class, which would require class members to make an affirmative election to be included. This practical simplification (a return to equity) of the class action rule was ultimately rejected, and the debate over mandatory, opt-out, and opt-in classes has continued. A current suggestion would, illogically and contrary to historic Rule 23 principles,[4] provide for opt-in classes, in "small claims" cases: the

[4] As Judge Schwarzer, the former director of the Federal Justice Center and a prominent authority in federal procedure, has noted, "the original purpose of the 1966 Rule primarily was to enable litigation of numerous related small claims, such as those commonly found in consumer, securities, and antitrust actions." The "salient characteristics of these kinds of class actions" include "individual claims [that] are generally too small to permit plaintiffs to prosecute them individually." Schwarzer, "Structuring Multiclaim Litigation: Should Rule 23 Be Revised?" 94 Mich. L. Rev. 1250, 1255 (1996).

very cases in which class members are least likely, and the last cases in which they should be required, to take affirmative action as a condition of class membership.

From all of this Rule 23 debate, one proposal has emerged for implementation: the availability of interlocutory appeal from the class certification decisions of federal trial courts. While defendants typically favor this provision, it has been subjected to substantial criticism from plaintiffs, commentators, and judges who predict that many of the efficiencies of class actions will be lost as class action decisions languish in the courts of appeals. This prospect of delay frustrates one of the fundamental purposes of class actions, and is inconsistent with the historically broad discretion which has been given to trial courts, as courts of equity and as the courts most familiar with the facts and issues, to manage the cases before them. It should be recalled that the class action rule is purely procedural: a determination on class certification does not and must not involve an evaluation of who will win, or who should win, the case. The class certification decision determines only whether all members of a proposed class will be bound by the outcome, favorable or not.

The Empirical Evidence: No Widespread Abuse

Class actions were intended to prevent abuse of superior economic power, but are class actions themselves subject to widespread abuse? While there has been an expression of concern on this point, the empirical data suggests that the class action procedure is not unfair to defendants.

In 1994/1995, the Federal Judicial Center conducted a systematic review of the operation of Rule 23 at the request of the Federal Rules Advisory Committee.[5] The results are reported in "Symposium: The Institute of Judicial Administration Research Conference on Class Actions: Class Actions and the Rulemaking Process: An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges," 71 N.Y.U. L. Rev. 74 (April/May 1996). The Federal Judicial Center's study refutes the policy criticisms most frequently voiced by corporate defendants and academic critics, debunking as largely mythical the assertions that: (1) class actions constitute frivolous strike suits that use the remote threat of huge judgments to induce quick settlements; (2) the merits are rarely addressed in class actions, because certification of class induces an immediate settlement; and (3) attorneys end up benefitting at the expense of, or without a corresponding benefit to, the represented plaintiffs.

The Report determined that: (1) judges frequently rule on motions to dismiss and motions for summary judgment prior to concluding a class case, demonstrating that the merits are often addressed and adjudicated in class actions, and that class actions do not necessarily produce quick settlements that have nothing to do with the merits of a case; (2) attorneys' fees in the class context were "generally in the traditional range of approximately 1/3 of the total settlement" *Id.* at 176; (3) "while attorneys clearly derive substantial benefits from settlements, the recoveries to the class in most cases were not trivial in comparison to the fees," *Id.*; (4) "although certified cases in the study settled at a higher rate than cases not certified as class actions, there were not objective indications that settlement was coerced by class certification" (*id.*); and (5) "Settlement and trial rates for cases filed as class actions were not much different from settlement and trial rates for civil cases generally" *Id.* at 177.

As the Federal Judicial Center concluded, "recoveries by individual class members were in amounts that could not be expected to support individual actions. This finding confirms that many cases satisfy an underlying purpose of Rule 23, which is to provide a mechanism for the collective litigation of relatively small claims that would not otherwise support cost-effective litigation." *Id.* at 176. Class actions did not force unfair settlements: . . . "settlements often appeared to be the combined product of a case surviving a motion to dismiss and/or a motion for summary judgment as well as being certified as a class action. Whether the size of the potential liability affected settlement was beyond the scope of the current study." *Id.* Far from being over utilized, the Federal Judicial Center study concludes that "class actions are far from routine." *Id.* at 96.

Many critics assume that class action litigation proceeds directly from certification of a class to settlement without judicial examination of the merits of the claims. "The data . . . indicate otherwise." *Id.* at 104. Parties often filed motions to dismiss or motions for summary judgment, and judges generally ruled on those motions in

[5]The Center collected data relating to all class actions terminated between July 1, 1992 and June 30, 1994 in four federal district courts: the Eastern District of Pennsylvania (E.D. Pa., headquartered in Philadelphia), the Southern District of Florida (S.D. Fla., headquartered in Miami), the Northern District of Illinois (N.D. Ill., headquartered in Chicago), and the Northern District of California (N.D. Cal., headquartered in San Francisco).

a timely fashion, often dismissing a case in whole or in part. These rulings on the merits often preceded rulings on class certification. *Id.*

Critics of the class action device refer to such cases as "strike suits." While it is difficult to find a legitimately objective definition of a "strike suit" that distinguishes it from most other types of litigation, two essential ingredients seem to be the defendants' perceived frivolity of the allegations and the difficulty of defendants obtaining vindication on a ruling on the merits. The ultimate test of the "strike" element seems to be whether the claims lead to a coerced settlement because the defendants do not have a reasonable opportunity to litigate the merits.

The survey assumed that if a claim for relief survives the motion to dismiss, its legal claims are probably not frivolous, and that if a claim survived a motion for summary judgment, its material factual allegations were probably not frivolous. The survey found that overall, "approximately two out three cases in each of the four districts had rulings on either a motion to dismiss, a motion for summary judgment, or a *sua sponte* dismissal order." *Id.* at 109. The conclusion: ". . . defendants generally appear to have had an opportunity to test the merits of the litigation and obtain a judicial ruling in a reasonably timely manner, particularly for motions to dismiss." *Id.* at 111.

Despite the empirical evidence that Rule 23 works fairly in its present form, and disproves rumors of its abuse, the move to dismantle the class action has increased. The mid-90s have seen intense debate and serious consideration of proposed amendments to Rule 23 that would, for example, eliminate class treatment of small claims that "just ain't worth it"; impose an additional "maturity" factor that requires those seeking class treatment to demonstrate a track record of successful jury trials; and transform the class certification decision from a case management determination made early in the case (subject to ongoing revisitation by the trial court) into an order subject to immediate interlocutory appeal and correction. These initiatives were expressly designed to give more "guidance" and less discretion to trial courts, and thereby to reduce the incidence of class certification and inhibit the finding of class actions.

The Federal Rules Advisory Committee has considered at least the following proposed additions to Rule 23: (1) proposed revised subsection 23(b)(3)(C) (to insert a "maturity" factor); (2) proposed new subsection 23(b)(3)(F) (to insert a "cost/benefit" or so-called "just ain't worth it" factor); (3) proposed new subsection 23(b)(4) (to provide a separate subsection for settlement classes); and (4) proposed new subsection 23(f) (to provide for interlocutory appeals of class rulings). Only the last proposal has been implemented at this time.

It appears, at least for the moment, that action to implement further amendments to Rule 23 has abated in the wake of the Supreme Court's June, 1997 *Amchem* decision. The Amchem decision provides substantial guidance to trial courts in what had been the most controversial area of proposed amendments to Rule 23: procedures for the approval of settlement classes and the due process requirements of class action settlements. The *Amchem* decision does not prohibit settlement classes, and specifies the nature and level of scrutiny to be conducted by courts in the class action settlement approval process. It appears to be the present consensus that any future amendments to Rule 23 should await further judicial experience with *Amchem*. This is a wise decision. The addition of greater specificity to Rule 23, in a well-intentioned effort to provide the trial courts with additional guidelines, would inevitably increase litigation over the minutia of class certification decisions without advancing the purposes and policies of the class action itself. Indeed, if there is to be any change to Rule 23 at all, it should be in the direction of greater simplicity and the reservation of broader discretion to the trial courts.

Proposed Rule 23(b)(3)(C) Changes: The "Maturity" Factor vs. Mass Tort Class Certification

Recent judicial invocation of the concept of the "immature tort" has lead to oft-cited denials or reversals of class treatment in the mass tort arena; *see, e.g., Castano* v. American Tobacco Co., *160 F.R.D. 544 (E.D. La. 1995), reversed, 84 F.3d 734 (5th Cir. 1996); In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir.) *cert. denied*, ____U.S.____, 116 S. Ct. 184 (1995). The maturity doctrine abjures early class treatment in favor of a "consensus or maturing of judgment," achieved through numerous individual trials, thereby preventing any one jury—even a class jury—from holding "the fate of an industry in the palm of its hand." 51 F.3d at 1300.

Despite the implicit preference of the Federal Rules, expressed in Rule 23(a)(2) and 23(c)(4)(A), for the consistency and finality of common (class) adjudication of common issues, maturity advocates urge that the common trial, in the words of *Rhone-Poulenc*, 51 F.3d at 1300, "need not be tolerated when the alternative exists of submitting an issue to multiple juries constituting in the aggregate a much larger

and more diverse sample of decision-makers." *Id. Accord, Castano* 84 F.3d at 747–750. This shift from preference to intolerance may have much to commend it for sheer shock value. It has certainly gotten the attention of formerly complacent class advocates, and the applause of corporations who have been its chief beneficiaries. There are, however, two fundamental problems with the inclusion of "maturity" as a class certification factor.

First, other than the above-referenced appellate decisions and the law review articles upon whom they in turn rely, there is no body of empirical evidence upon which the onset of "maturity" can be calculated or quantified. How many trials? How many months or years? What are the benchmarks or indicia of maturity? There is no data that can lead to a precise or reliable evaluation of "maturity," either in the absolute or relativistically, by either the trial court or any reviewing court. *Rhone-Poulenc*'s maturity analysis was a merits assessment in thin disguise; an assessment, as others have since noted, that proved to be a poor predictor of that litigation's ultimate settlement value, as a class action, to *both* sides.[6]

Second, there is no objective or scientific support for the fundamental premise of the maturity doctrine that multiple juries will reach a more accurate or just result than would a single jury, if presented with all relevant evidence and properly instructed in the applicable laws. Certainly the fate of a company or an industry compels great care in the design and structure of a civil trial. Were the single jury, however, considered unworthy of making the final determination of other issues of equal or greater import, such as the life or liberty of a citizen in the criminal context, we would have seen movement toward multiple juries in such areas as well.

What the *Harvard Law Review* has dubbed the judicial "solicitude for the economic well-being of class defendants" has manifested itself most radically in the *Castano* and *Rhone-Poulenc* decisions, which categorically rejected the ability of the trial courts in those cases to construct manageable class structures. In both decisions, appellate judicial antipathy toward the substance of the class claims was palpable, and each defied the "no merits" stricture of the Supreme Court in branding these claims as unworthy and incapable of class treatment—the *Castano* nicotine addiction claims for their alleged (and short-lived) novelty, and the *Rhone-Poulenc* blood contamination claims for their failure to prevail in a handful of individual trials. *Castano* was the more far-reaching of the two decisions, and the more incompatible with the Rule 23 purpose of preventing a multiplicity of actions, because it espoused an "immature tort" doctrine it claimed precluded satisfaction of the Rule 23(b)(3) "superiority" requirement for certification. *Castano* defined an "immature tort" as one that lacks a "prior track record of trials from which the district court can draw the information necessary to make the predominance and superiority analysis." 84 F.3d at 747.

In the *Castano* analysis, class certification of "immature torts" is improper because the lack of adequate information gleaned from the conduct and evidence of prior individual trials precludes the district court from determining whether common issues of law or fact predominate and whether the class action is superior, from the standpoint of manageability, to individual adjudications. *Id.* Thus, we must dispense with the notion that one purpose of class actions is to avoid the burden and confusion of multiple litigation; we must have such piecemeal litigation first. We may not seek to avoid a mass tort judicial crisis by certifying a class; we must wait to see if one develops. *Id.* at 747–48. In the *Castano* universe, the barn door should be bolted, if at all, *after* the horses escape—while they remain inside, the potential for egress is an immature prospect, and closure is hence premature. If this perspective seems inimical to common sense, it is. To make matters worse, the Advisory Committee has proposed (but has not yet acted) to address this gap between Rule 23 language and judicial resistance to class actions by amending the Rule—to change "as soon as" to "when"—presumably to allow ample time for judicial crises to fester before class treatment is eventually tried, not as a prophylactic measure, but as a last resort.

The *Castano* appellate decision scolded plaintiffs' lawyers for arguing both of the dual, complementary policies behind Rule 23—to provide access to those who could not afford the several million dollars it has historically taken[7] to litigate each indi-

[6] Ironically, the litigation decertified by the Seventh Circuit in *Rhone-Poulenc* has now been re-certified, at the defendants' request, as a settlement class, to effectuate a $600 million settlement that has received widespread support from the class.

[7] In *Haines, Cipollone* v. *Liggett Group, Inc.*, No. 83–2864 (D.N.J.), there were over 100 motions, four interlocutory appeals, one final appeal, and two petitions for certiorari. Defendants deposed one of plaintiffs' experts, a doctor, for 22 days. The final verdict for plaintiff in *Cippollone* was $400,000. See *Cippollone* v. *Liggett Group, Inc.*, 693 F.Supp. 208 (D.N.J. 1988).

Continued

vidual smoker's case, and to prevent the waste and confusion of multiple suits—by accusing them of disingenuousness. *Id.* at 748. Smokers' individual claims were not "negative value" (small claim) suits, the *Castano* decision opined, because punitive damages were theoretically available in individual cases, and some lawyers, presumably, would be willing to take them. The district and appellate record demonstrating the tobacco industry's superlative mastery of attrition tactics[8] was conveniently ignored in favor of articulation of an untested "immature tort" theory and the factually unsupported assumption that the claims for which class treatment was sought were: 1) feasible subjects of individual litigation; 2) best disposed of through summary judgment in defendants' favor. Judicial antipathy toward the claims themselves was palpable.

The *Castano* decision has not withstood objective scrutiny. As one commentator has observed, *Castano*'s downfall as valid certification jurisprudence was its employment of a "strict tort 'maturity' test that functions as an unwritten requirement for mass tort certification . . . an examination demonstrates that *Castano*'s maturity test presents difficulties of definition and application that strongly counsels against its inclusion in the class action certification process." *See* Note, 110 Harv. L. Rev. 977, 979 (Feb. 1997). When does a tort become "mature"? How many trials constitute an adequate "track record"? *Castano* provided no guidelines, nor cited any empirical data to support the utility of the notion of a "mature" tort, nor any sense to determine when a tort is sufficiently mature to warrant class treatment. In practice, the "immature tort" doctrine may function as simply another excuse not to certify, as courts reluctant to force the management challenges of class treatment invoke the Goldilocks doctrine to declare torts too young, too old, too successful, or not successful enough—but never just right for certification. As the Harvard commentator concludes, the maturity test arguably promotes "sound judicial restraint in the face of empirical uncertainty." *Id.* at 982. But "the consequences of such forbearance would be an institutional inertia application of conferring unneeded advantages upon defendants." *Id.* The novel "immature tort" doctrine thus promotes precisely the procedural inequality Rule 23 was intended to prevent.

The ideology that embraces the "immature tort" doctrine is itself at odds with the fundamental principles of Rule 23. Both *Rhone-Poulenc*, 51 F.3d at 1299–1302 and *Castano*, 84 F.3d at 748–750, articulate the newly fashionable preference for multiple jury trials, in multiple jurisdictions, that will supposedly culminate in a "mature tort." However, there is no suggestion that such trials would constitute a statistically valid random sample of all claims, or the judicial, economic, and societal consequences of the most likely end result of such a "maturation" process: a grab bag of inconsistent results, and a whole which is *less* than the sum of its parts because it offers no coherent guidance for the ultimate resolution of claims.

The cynicism that permeates *Rhone-Poulenc* and *Castano* would answer that such inconsistency proves that class treatment would have been inappropriate, since the existence of common legal or factual issues would result in consistent outcomes. This response ignores the real world, and the magnitude of variables, having little or nothing to do with the merits of claims, the evidence presented, or the law at issue, that can affect jury outcomes. This does not disprove the superiority of a *single* jury trial; to the contrary: a single court, fully aware of the magnitude of the action and the matters at stake can assure that the pace is conscientiously developed, well-presented, and properly tried.

In affirming a district trial court's nationwide class certification of school districts' property damage claims in *In Re School Asbestos Litigation*, 789 F.2d 996 (3rd Cir. 1986), the Third Circuit endorsed unitary adjudication over piecemeal litigation, and commented that, absent class action treatment, inconsistency in verdicts in a mass tort context made litigation look "more like roulette than jurisprudence," and "the asbestos litigation [in particular] often resembles the casinos 60 miles east of Phila-

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Plaintiffs expended over $500,000 in out-of-pocket costs and over $2 million in lawyer and paralegal time. The defendant tobacco companies had spent an estimated $50 million in defense. See Andrew Blum, "Will Next Round of Smoking Challenges Be Worth Pursuing?," *The National Law Journal*, June 21, 1988. The tobacco company attorneys were quoted in the press as stating, "This verdict sends a message to all plaintiffs' attorneys that these cases are not worth pursuing." *Id.* The verdict was followed by more appeals to the Court of Appeals and the Supreme Court which affirmed and reversed in part. *See Cipollone* v. *Liggett Group, Inc.*, 893 F.2d 541 (3d Cir. 1990), and *Cippollone* v. *Liggett Group, Inc.*, 112 S.Ct. 2608 (1992).

[8] As R. J. Reynolds' counsel put it:

> "[T]he aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiffs' lawyers, particularly sole practitioners. To paraphrase General Patton, the way we won these cases was not by making that other son of a bitch spend all his." quoted in *Haines* v. *Liggett Group, Inc.*, 814 F. Supp. 414, 421 (D.N.J. 1993).

delphia, rather than a courtroom procedure." 789 F.2d at 1001. American society, and the civil justice system to which it looks for the resolution of its disputes, would not knowingly tolerate a judicial preference for the waste and randomness of roulette adjudication, either as an alternative or as a prelude to the unitary adjudication of common issues through class litigation.

Nowhere but in the mass tort arena has the multiple jury/maturity concept gained sny legitimacy. We must therefore be skeptical of its apparently unique appeal in the tort arena, and ask whether it is not an attempt, however subliminal, to stack the deck in favor of the corporate litigant with the greater assets and the longer life span; that is, to sanction and encourage tactics that multiply the very costs, expenses, and delays that the Federal Rules are designed to discourage, or at least to neutralize. Concepts, however flexible at their outset, have a tendency to become arbitrary and brittle in application. The rote invocation of "maturity" as a factor for certification by the trial courts may consign future litigants to a strategic war by sttrition: that same war against which all the other Federal Rules are arrayed.

One rationale, promoted by defendants opposing class treatment of mass tort cases, and sometimes adopted by judges in denying or decertifying classes, posits that the individual plaintiff's best interests are promoted by the freedom to pursue an individual suit, unhampered by the strictures of class treatment. This paternalistic argument ignores the cost barriers that may effectively preclude such individual litigation, even in relatively high-value personal injury or wrongful death claims, and has an ominous similarity to the "freedom of contract" argument advanced in the early part of this century in opposition to governmental and union initiatives to improve wages and working conditions. It also ignores the growing tendency of plaintiffs' personal injury attorneys to organize themselves for the purpose of cooperative and coordinated discovery and pre-trial activity in mass tort cases, and the increasing utilization of procedures such as multi-district transfer and coordination under 28 U.S.C. § 1407 to provide a single federal forum for such efforts.

Nor does the class certification of mass tort claims necessarily connote the unitary adjudication of all issues. Many issues in mass torts remain inescapably individual, and the specific causation and damages phases of any mass tort litigation, class or individual, will require some form of claimant-by-claimant adjudication. Rule 23(c)(4)(A) has been utilized to sever common claims or issues for class treatment in such circumstances. *See In Re Copley Pharmaceutical Co. "Albuterol" Products Liability Litigation*, 161 F.R.D. 456, 463–470 (D. Wyo. 1995) (denying defendants' decertification order, criticizing *Rhone-Poulenc*, in establishing trial plan for class trial of common liability issues, to be followed by individual trials of remaining issues of causation, injury and damages.) Rule 23(c)(4)(A) has yet to realize its full potential in bringing class action techniques to mass tort cases.

The prospect of a corporation unfairly consigned to utter ruin by a single runaway class action jury is remote.[9] Most corporations can afford, and do retain, the very best counsel in their defense. Corporate defendants do not have the burden of proof in civil trials, and in most jurisdictions the burden of proof that plaintiffs must meet before punitive damages may be imposed is that of proof by clear and convincing evidence, not by a mere preponderance. A greater risk of immaturity is that of plaintiffs and counsel who rush to certification, and to the class trial, ill-prepared to meet their burden, holding the fate of an entire class in the palm of their hand. In this sense, maturity is subsumed in the requirement of adequate representation. The maturity of the presentation of claims and issues to the trial court, and the ability of the class claims to be well and fairly tried, is presently examined within current 23(b)(3)'s predominance factor.

The 1996 enthusiasm for insertion of an additional "maturity" factor into Rule 23(b)(3)'s class certification requirements has, fortunately, subsided. The Advisory Committee modified the post-*Castano* version of the maturity language to de-emphasize the "immature tort" concept in May 1997. The new version simply includes "maturity" as a factor that may be pertinent to the predominance and superiority deter-

[9]The largest class action judgment to date, the $5 billion class judgment in the *Exxon Valdez* litigation, has not (or more accurately, will not, if and when it is eventually paid) impair the financial vitality of the Exxon Corp. No one can begrudge the 10,000 victims of Marcos' reign of terror their nearly $3 billion classwide judgment, obtained through a trifurcated class trial structure described in *In Re Marcos Human Rights Litigation*, 910 F. Supp. 1460 (D. Hawaii 1995) and affirmed recently by the Ninth Circuit *sub. nom. Hilao* v. *Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996). It was not the $4.255 billion class action settlement in *In Re Silicone Gel Breast Implants Products Liability Litigation*, MDL 926, that precipitated the Dow Corning bankruptcy: the stated reason for that company's initiation of voluntary Chapter 11 proceedings was its continued exposure to *individual* claims outside that non-mandatory settlement class. Ironically, Dow Corning itself has now proposed a class action common-issues trial in its plan of reorganization.

mination and would require the trial court to consider "the nature and extent of any related controversy, and the maturity of any issues involved in the controversy." This modification may reflect the growing awareness that the *Castano* court's declaration of the nicotine addiction theory as "immature" was itself premature. The *Castano* decision, 84 F.3d at 737, scoffed at the nicotine addiction/manipulation theory in these words:

> The gravamen of [the *Castano*] complaint is the novel and wholly untested theory that the defendants fraudulently failed to inform consumers that nicotine is addictive and manipulated the level of nicotine in cigarettes to sustain their addictive nature.

Of course, the ink was no sooner dry on this language than documents obtained in the Attorneys' General and *Castano* plaintiffs' suits revealed that, in fact, the tobacco companies had manipulated nicotine levels, and knew and exploited the addictive properties of nicotine, all the while suppressing this information and concealing it from the public. The supposedly "immature" theories of *Castano* have become the major themes in the current wave of tobacco litigation, have driven the proposed comprehensive settlement now before Congress and have the starring role in the Minnesota Attorney General's tobacco trial currently underway. As events have shown, the nicotine addiction/manipulation claims of millions of American smokers could and should have been efficiently, consistently, and fairly adjudicated in a single nationwide class action.[10]

Class Actions Control Attorneys' Fees and Reduce Litigation Costs

Much of the public's (or at least the mass media's) interest in, and criticism of, class actions focuses on attorneys' fees. Ironically, early opposition to the utilization of class actions in the asbestos litigation and other mass tort litigation came not (solely) from defendants, but from plaintiffs' lawyers, who correctly feared that class actions would moderate contingent fees and bring them under unwanted court scrutiny. Because of the economies of scale of class actions, attorneys' fees have historically been substantially lower in class actions than in individual contingent litigation. Class actions are not simply aggregations of individual claims; class actions impose unique fiduciary roles on courts and counsel alike, that are designed to check lawsuit abuse.

Before a class can be created or "certified," all class action cases require the named plaintiffs and their lawyers, who propose to represent the class, to prove their adequacy by showing that they will vigorously pursue the class claims and will protect their interests. Lack of expertise or vigor, or conflict of interest, are grounds for decertification. Defendants may attack class certification on adequacy grounds, and the court must be satisfied that the class members will be protected and the class will not be misused.

The scrutiny does not stop when the class is certified. The court remains the guardian of the due process rights—such as the rights of class members to notice, to be heard, and to object to proposed settlements—until the action is terminated. This court protection of class member procedural rights protects the legitimate interests of defendants as well, because it precludes the exploitation of a purported class action as leverage against defendants. Lawyers who would be designated to serve as class counsel must commit their own efforts and resources, may not dismiss the class action without court approval, and must notify the class members of important events that affect their rights. This is a significant responsibility, with attendant burdens, duties and risks. Class actions can reward ingenuity and skill on the part of designated counsel, but class actions are no place for unfettered entrepreneurs.

Numerous studies conducted by courts, commentators, and institutions, have confirmed an historical range of attorneys' fees in class actions of from 20% to 30%. In very large, "mega" class actions (e.g., recoveries of $100 million) the percentages become much lower.[11] By contrast, individual contingent fees in personal injury

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[10] Other courts have begun a post-Castano, Amchem era return to class treatment in mass injury cases. For example, on April 2, 1997, the federal court in *In re Telectronics Pacing Systems, Inc., Accufix Atrial "J" Leads Products Liability Litigation*, MDL–1057 (S.D. Ohio 1997) *re*-certified the common liability issues raised by the medical monitoring, strict liability, and negligence claims of a nationwide class of personal injury-wrongful death claimants in a product liability action that had been first been certified, then decertified by that court during the volatile fluctuations of mass tort class action jurisprudence of 1995–96.

[11] As observed in *In Re Domestic Air Transportation Antitrust Litigation*, 148 F.R.D. 297 (N.D. Ga. 1993), "in megafund cases where extraordinarily large class recoveries . . . are recovered, courts most stringently weigh the economics of scale inherent in class actions in fixing an appro-

cases range from 30% to 50% and higher, and do not typically scale down as aggregate recoveries increase. Thus, in a typical class mass tort action, the attorneys' fee, on a percentage basis, will be substantially smaller than in an aggregation of individual tort suits. This benefits the claimants, who receive a larger share of the recovery, and it benefits defendants because their transaction costs are reduced. For example, estimates place asbestos litigation transaction costs (including both sides attorneys' fees) at over 60¢ of every dollar. By contrast, the global class action settlement of the *Breast Implant* litigation proposed in 1994 would have capped all transaction costs (including attorneys' fees, settlement notice and settlement administration costs) at 21¢ on the dollar. The successor to that proposed settlement, the *Revised Settlement Program* in the *Federal Breast Implants* litigation, employs class action procedures and similarly caps contingent fees at 30¢ *or less* of claims paid.

Moreover, in class actions, the amount of attorneys' fees is directly controlled by the court. Class action lawyers have no entitlement to fees. Their contingent fee contracts with their individual clients are not automatically enforceable. The courts are empowered to limit fees to a reasonable percentage of the aggregate recovery, or to a reasonable hourly rate. While the percentage of recovery fee evaluation method has gained the favor of most courts because it emphasizes results achieved rather than time spent, the courts may, and frequently do, review time and costs records as a check against percentage recoveries, in order to avoid windfall fees. Through these methods, courts in class actions have, and use, the power to regulate fees and avoid lawyers' windfalls to an extent not possible in individual contingent litigation. [12]

Occasionally, class action attorneys' fees that seem abnormally high for the time spent or results achieved make news. However, these fees are news precisely because they are anomalies, and because they have been challenged by class members and *disapproved* by the courts. What is often ignored in the public outcry is that the class action settlement or class action fee which is identified as unfair or unreasonable is rejected by the court. When this occurs, the class action settlement approval process is functioning as it should. In the majority of class action settlements—those that pass strict court scrutiny, win class member support, and achieve the necessary judicial approval—are fair, reasonable, and beneficial to class members. That is why the United States Supreme Court in Amchem, while disapproving the particular settlement before it, took care to provide positive and practical guidelines to promote and encourage the utilization of class actions and the fair settlements of class actions for the benefit of class members, defendants, and the court system alike.

Class Actions in State Court

As mentioned above, most states had rules, statutes, or caselaw that provided for class actions as exercises of their courts' equity jurisdiction by the end of the 19th Century. Indeed, until the amendment of Federal Rule 23 in 1966, it is fair to say that most class actions were litigated in the state courts. However, these most frequently involved local or statewide disputes. From the 1966 amendment of Rule 23 through at least the mid-1980s, class action practice was predominantly federal, as litigation in the areas of securities fraud, anti-trust, civil rights, and employment discrimination became the focus of class action jurisprudence. The late 1980s and the early 1990s saw the emergence of the "mass tort" class action, and the application of class action procedure to multiple personal injury and wrongful death claims arising from a single-site or single-incident disaster (such as the Exxon Valdez), a single defective product, or long-term toxic exposure. These cases were most frequently brought in (or removed to) the federal courts, although they involved state law-based tort claims.

The federal courts were able to manage these mass tort cases, either as class actions or groups of coordinated individual actions, because federal legislation in the

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priate percent recovery for reasonable fees. . . . Accordingly, fees in the range of 6–10% and even lower are common in this large scale context. 148 F.R.D. at 351.

[12] *See* Hirsch & Sheehey, *Awarding Attorneys' Fees and Managing Fee Litigation*, Federal Judicial Center (1994); *Manual for Complex Litigation* 3d, §§ 24.1, *et seq.*; *Hensley* v. *Eckerhart*, 461 U.S. 424, 425 n.11 (1983); *In re Air Crash Disaster at Florida Everglades*, 549 F.2d 1006 (5th Cir. 1977) (inherent powers of court in complex litigation); *Camden I Condominium Ass'n, Inc.* v. *Dunkle*, 946 F.2d 768 (11th Cir. 1991) (multi-factor analysis for setting reasonable percentage of recovery fees); Court Awarded Attorneys' Fees, Report of the Third Circuit Task Force, 108 F.R.D. 237 (1985) (lodestar vs. percentage); *Swedish Hosp. Corp.* v. *Shalala*, 1 F.3d 161 (D.C. Cir. 1993) (percentage methodology); *In re Continental Ill. Sec. Litigation*, 962 F.2d 566 (7th Cir. 1992) (market value of services); *Paul Johnson, Alston & Hunt* v. *Graulty*, 886 F.2d 268 (9th Cir. 1989) (percentage basis); *Brown* v. *Phillips Petroleum Co.*, 838 F.2d 451 (10th Cir. 1988) (same).

1970s had provided a mechanism, the multi-district litigation statute, 28 U.S.C. § 1407, that enabled all federal cases involving common issues of law or fact to be transferred to, and managed by, a single federal court anywhere in the country. To date, over 1,200 litigations have been coordinated under the multidistrict litigation, or "MDL" statute by the seven federal district judges who comprise the Judicial Panel on Multidistrict Litigation. One of the most recent groups of "mass tort" cases to be designated as an "MDL" are the hundreds of cases (filed in over 35 states) that comprise the "fen-phen" litigation, which, as the *In re Diet Drugs (Fenfluramine/ Dexfenfluramine/Phentermine) Litigation*, MDL No. 1203, was transferred on December 10, 1997, by the Judicial Panel to the federal district court in Philadelphia and assigned to Chief Judge Emeritus Louis C. Bechtle.

One of the important factors that the Judicial Panel on Multidistrict Litigation continues to consider in coordinating actions under § 1407 is the avoidance of inconsistent determinations of multiple class action motions. The federal courts' ability to transfer cases from federal districts around the country to a single forum for unitary adjudication of common issues promotes the efficiency and consistency of result that is inherent in the class action mechanism. Moreover, a federal court's class certification decision has nationwide effect, and federal courts can protect their ongoing jurisdiction over nationwide class actions by invoking 28 U.S.C. § 1651, the All Writs Act, to enjoin competing actions. This prevents the disruptive or distracting tactic of asserting competing or overlapping class actions, or the prospect of class members (or defendants) simply ignoring a federal court's decree.

In 1985, the United States Supreme Court ruled that state courts may also certify nationwide class actions, if due process requirements are met. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). Additionally, in certain circumstances, if the state's choice of law doctrine and the Constitution permits it, a state court may apply a single state's law (its own or another's) to the claims of the nationwide class. *Id.* More recently, in 1995, the Supreme Court affirmed that state courts have jurisdiction to settle nationwide classes as well (including claims that could have been *litigated* only in federal counts), and their final judgments, if entered in compliance with due process, are entitled to full faith and credit in other courts. *Matsushita v. Epstein*, ____U.S.____, 116 S. Ct. 873 (1996). It would thus appear that the existence of similar class action statutes, rules and case law in the federal and state courts, and the United States Supreme Court's recognition of state courts' potentially nationwide authority, has created a parallel system of federal and state court class actions with equal power.

As a practical matter, this is not the case. Instead, the legitimate utilization of federalism principles, as well as the self-serving tactics of forum selection, have created, in many instances, a confusing and contradictory situation in which state courts have certified nationwide class actions, federal courts have denied class certification to the same or similar claims, or multiple courts have attempted to certify, and assert jurisdiction over, the same or similar classes. State courts do not possess the power to enjoin other state courts, or federal courts, from certifying similar classes, nor can they ever achieve such power under our system. Federal courts can prevent this situation, but only if they certify classes and assert their injunctive powers to protect their ongoing jurisdiction over class members. Many federal courts, conscious of the state law-based nature of the claims that may be before them, are reluctant to take this step. Moreover, a recent spate of federal decisions denying class certification in major mass tort cases has accelerated an exodus to the state courts, who are willing to certify such claims.

Recent Experiences with Nationwide Classes in State Courts

One overarching phenomenon of the 1990 is the trend toward the litigation and settlement of nationwide tort claims in state, rather than in federal courts. This trend will likely be accelerated by two recent high court decisions: the Supreme Court's affirmance of state court jurisdiction to resolve nationwide class claims, articulated in *Matsushita Elec. Indus. Co., LTD. v. Epstein*, ____U.S.____, 116 S. Ct. 873 (1996); and the Third Circuit's prescription for the statewide resolution of products liability issues articulated in *Georgine v. Amchem*, 83 F.3d 610 (3d Cir. 1996), as affirmed by the Supreme Court in *Amchem Products, Inc. v. Windsor*, ____U.S.____, 117 S. Ct. 2231 (1997).

The emerging leadership of state courts in effectuating nationwide settlements is described and exemplified in the *Cox v. Shell Oil Co. (Polybutylene Pipe Litigation)* which culminated in a $950 million settlement approved by the Chancery Court of Obion County, Tennessee in October 1995. As the *Cox* Final Order describes, years of individual and group litigation in the federal and state courts were followed, in succession, by a failed federal class action settlement, the certification of overlapping nationwide classes by courts in two states, the intercession of a third state

court to catalyze nationwide settlement discussions, and the ultimate approval of a $950 million settlement for a nationwide settlement class, not in a federal court (as would have been the most likely forum in the 1970s, 1980s, or even early 1990s), in the Chancery Court of Obion County, Tennessee. The settlement withstood appellate challenge and is three years into the claims process, which is providing replumbing, repairs and damage compensation to homeowners across the country.

A similar saga played out in the *Miracle Ear* litigation, a series of consumer fraud cases arising from allegations that the manufacturer misrepresented the abilities of its hearing aid to reduce "unwanted background noise" and sold it for inflated prices. The safety of the device was not at issue. The first class action was brought in a California federal court, from which it was dismissed with a recommendation from the judge that the state law claims be pursued in state court. Two roughly parallel state court proceedings followed, in Minnesota and Alabama, respectively. Here again, the two courts certified overlapping nationwide classes for litigation purposes, and, although settlement discussions proceeded separately in the two cases, both courts ultimately granted preliminary and final approval in parallel proceedings, utilizing a dual-captioned class notice.

Federal-State Coordination

The pendency of related federal and state actions is not unusual, and the concept of federal court-state court coordination has been increasingly embraced by the courts, formally endorsed by the *Manual for Complex Litigation 3d*, §§ 31.3, *et seq.* (Federal Judicial Center 1995), and demonstrated effectively in such coordinated federal/state proceedings as the Alaska federal/state court *Exxon Valdez* litigation. While such federal/state litigation may be marked by divergent rulings (as was the *Exxon Valdez* litigation with respect to the initial class certification determinations, which the state court certified and the federal court denied),[13] it is now acknowledged that joint or parallel pretrial orders, coordinated discovery, and settlement approval processes are not only permissible and proper, but advantageous in the definitive resolution of related litigation in multiple fora.[14]

There will continue to be additional variations to this theme. In a recent example, when the Third Circuit and the Texas Supreme Court disapproved (on different grounds) the first proposed settlement in the *GM Pick-Up Truck* litigation,[15] the *GM* litigation was not confined to the federal multidistrict proceedings in Pennsylvania; separate statewide classes were certified in Louisiana and Georgia, at the outset of the litigation, for trial purposes, and the Texas state court certified a Texas class for purposes of the initial settlement. The subsequent settlement negotiated by counsel from federal and state court actions utilized an alternative forum, the Louisiana state court that certified a litigation class, as the venue for preliminary approval, class notice, and final approval of a nationwide settlement, to elimi-

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[13] An excellent overview of the issues involved in coordinating federal and state litigation, with specific examples, including *Exxon Valdez*, of successful coordination, is contained in Schwarzer, Weiss, and Hirsch, "Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts," 78 Virginia Law Review 1689 (1992).

[14] Increasing interest and concern regarding the need to coordinate related litigation in multiple state fora culminated in the convocation of the first National Mass Tort Conference, held in Cincinnati, Ohio on November 10–13, 1994, under the joint sponsorship of the State Justice Institute, the Federal Judicial Center, the Judicial Conference of the United States, the Mass Tort Litigation Committee of the Conference of Chief Justices, the National Center for State Courts, and the National Judicial College. The State Justice Institute and the Federal Judicial Center provided funding, with the National Center for State Courts and the National Judicial College providing staff support. The conference was attended by over 300 state and federal judges, attorneys, and academics from across the country. Among the products of this watershed conference is a new state court companion to the federal *Manual for Complex Litigation Third:* the first edition of *Managing Mass Tort Cases: A Resource Book for State Court Trial Judges*, issued in December, 1995 and now available to state court judges nationwide. It includes, as appendices, a comprehensive set of Case Management, Discovery, Pleadings, and Consolidation Orders, provided by federal and state court judges from around the country, that are supplied on computer diskette to facilitate their utilization and adaption to specific cases. Because non-personal injury product liability cases are often framed, partially or entirely, as consumer actions and brought under state consumer protection/deceptive practices statutes, it is increasingly likely that the state courts will become the fora of choice for the nationwide assertion of these claims, and that such litigation will continue to be charactorized by parallel or overlapping action in multiple state fora.

[15] *See, e.g., In re General Motors Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768 (3d Cir.), *cert. denied sub nom, General Motors Corp.* v. *French*, ___U.S.___, 116 S. Ct. 88 (1995). The *GM Pick-Up* litigation involved non-personal injury/wrongful death claims asserted under fraud, warranty, and strict products liability (defective design and marketing) arising from an alleged safety defect in the fuel tank placement of 1973–1987 model Chevrolet and GMC pick-up trucks.

nate the confusion and duplication engendered by the previous multi-forum approval and appeal proceedings.

While there has been some concern, voiced primarily by academics, over the increasing utilization of state courts for the litigation and settlement of products liability class actions, the experience of those involved in actual cases has been that the near universal utilization and application of Federal Rule 23 provisions and principles by state courts, and the adoption and adaptation of the extensive body of federal class action jurisprudence to state substantive law and local practice, results in equivalent standards, familiar practice and procedures, and due process sufficient to allay most genuine concerns.

Exodus or Co-Existence? Mass Torts in the State and Federal Courts in the Aftermath of Amchem

While the Supreme Court's Rule 23 analysis in *Amchem Products, Inc.* v. *Windsor*, ___U.S.___, 117 S.Ct. 2231 (1997) was carefully focused on the particular (and peculiar) issues presented by the unique "future claims" settlement before it, the *Amchem* decision, if for no other reason than its rarity as a United States Supreme Court decision addressing class action issues, has achieved immediate impact far beyond its holdings. Because of the advance build-up the *Amchem* decision received in academic and judicial circles, as well as among practitioners, it was inevitable that, whatever its outcome and no matter how broadly or narrowly the decision itself was framed, it would have such impact, at least in the near term.

And so it has. The *Amchem* decision now features prominently in every brief filed by every defendant opposing class treatment in every case of every type. Suffice it to say that, in many of these cases, the *Amchem* rulings and rationales do not directly apply. By its own terms, *Amchem* does not foreclose the class treatment of products liability cases, nor the certification of nationwide classes on such claims. 117 S. Ct. at 2250.[16] In a real sense, *Amchem* empowered the potential class members of future products liability actions by insisting on their rights to notice and due process before their claims, present or future, a compromise. In its insistence on integrity of process, *Amchem* was intended to strengthen protections for class members, and to assure that the class action fulfills its equitable destiny. Thus, while *Amchem* may complicate and prolong the procedures by which a class action settles, or a settlement class is created or approved, it does not invalidate such procedures, and in the long run may ensure that these mechanisms worked to the greater benefit of class members in products liability cases.

Unfortunately, the perceived anti-certification aura that surrounds the *Amchem* decision is at odds with the language of the decision itself. As we are seeing, short term, the existence of the *Amchem* decision may be seized upon by opponents of class treatment as a high court bar to class certification wherever multi-state claims are present, or multiple states' laws may be invoked. That the *Amchem* decision itself was careful not to preclude class treatment of such claims is a message that is sometimes lost. *See Amchem*, 117 S.Ct. at 2250.

Because the more diffuse impressionism of the *Amchem* decision appears to be more influential at this juncture than its specific holdings, it is reasonable to predict that the trend toward increased class action activity in the state courts will continue, as plaintiffs react to the 1995, 1996, and 1997 federal jurisprudence and its resistance to nationwide class action management by the federal courts, or continue to seek to avoid perceived restraints on class action treatment by filing in state jurisdictions which continue to retain flexibility of interpretation in the class action area. Simultaneously, however, state courts are developing important class action jurisprudence that may lead, in the next several years, to a reverse trend and a return to the federal courts. For example, on December 17, 1997, the Alabama Supreme Court issued a series of decisions on a number of unresolved procedural issues in Alabama Rule 23 jurisprudence, including, most significantly, rulings that restrict the much-criticized practice of early "conditional class certification" by Alabama trial courts.[17] *See Ex Parte State Mutual Insurance Company*, ___So.2d___,

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[16] The *Amchem* decision acknowledges that "the text of [Rule 23] does not categorically exclude mass tort cases from class certification," and recognized that "[e]ven mass tort cases arising from a common cause or disaster may, depending upon the circumstances, satisfy the predominance requirement." *Amchem*, 117 S. Ct. at 2250. Thus, while predominance and superiority in the mass tort/product liability context must be irrefutably shown and scrupulously found, class treatment of multi-state and nationwide tort claims remains both possible and proper.

[17] In this context "conditional" class certification refers to a certification order obtained early in the case, frequently *ex parte* upon the filing of the complaint, before the "formal" class certification process has been completed, and perhaps before the defendant has appeared. The practice derives from Rule 23(c)(1). *See* discussion in *Citicorp*, 1997 Ala. LEXIS 476, **5–13. Taking a

1997 Ala. LEXIS 471 (Ala. 1997); *Ex Parte First National Bank of Jasper*, ___So.2d___, 1997, Ala. LEXIS 475 (Ala. 1997); and *Ex Parte Citicorp Acceptance Co., Inc.*, ___So.2d___, 1997, Ala. LEXIS 476 (Ala. 1997).

These opinions include a succinct history of the equity heritage of the class action mechanism, an analysis of the history and rationale of the "conditional certification" practice as it evolved in Alabama, and the conclusion that the first filed class action, rather than the first certified class action, triggers Alabama's abatement statute and takes precedence, to resolve the "race to the courthouse" among competing classes and the "claim jumping" phenomenon described by the parties and amici in the *State Mutual* appeal.

Despite the resulting and highly visible trend toward increased filings of multistate or nationwide property damage tort class actions in the state courts, in actuality the current state of such litigation is, to borrow a phrase from antitrust jurisprudence, that of conscious or unconscious parallelism. The initial forum selection of plaintiffs plays a major role, but so does the defendant's response: the strategic (or tactical) decision whether to remove an action filed in state court, or seek the dismissal of a federal court action on jurisdictional grounds. Once the opening moves of filing, removal, remand, or dismissal have been played out, however, what strikes the observer is that identical claims, of equal scope and magnitude, utilizing identical theories (and sometimes brought by the same counsel) are going forward in the state and federal systems simultaneously.

One striking example is that of the "hardboard siding" litigation, involving claims of inherent design defects (and sometimes manufacturing defects) in a range of products, made by several manufacturers, and marketed as superior alternatives to traditional wood exterior siding. This siding appears on millions of homes and commercial properties nationwide. At common issue in the many cases this product has spawned is whether it performs as claimed, or whether it deteriorates in service more rapidly than warranted (or at least justified by the express or implied claims of the manufacturer). The *Masonite* litigation includes related actions in both federal and state courts, but the nationwide class was certified for trial purposes in state court, while a competing putative nationwide class was denied by the MDL transferee court in the federal proceedings. *In re Masonite Hardboard Siding Litigation*, 170 F.R.D. 417 (E.D. La. 1997). The *Naef* v. *Masonite* class action proceeded to trial, and ultimately to a "no cap" nationwide settlement, worth potentially over $1 billion, in the Circuit Court of Mobile County, Alabama.[18] A similar hardboard siding product, made by manufacturer Louisiana-Pacific, was the subject of class action litigation brought—and settled—for at least $275 million—in the federal court system, the United States District Court for the District of Oregon.[19] Yet another set of related hardboard siding actions, filed against Georgia Pacific, was filed in Alabama federal and state courts, and settled in January 1998 in Alabama State Court.

As discussed elsewhere, prior concerns regarding the effective scope of the state court's jurisdiction to adjudicate and resolve nationwide product liability claims has been largely put to rest by the Supreme Court's *Matsushita* decision. Several circuit courts have, in dicta, stated a preference for the adjudication of product liability claims, which usually involve issues of state substantive law, by the state rather than federal courts. *See, e.g., Georgine, supra*. This preference arises from the con-

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cue from *Amchem*, and from its own prior decisions, the Alabama Supreme Court disapproved the practice of "instant" conditional certification by requiring a "rigorous analysis of the certification factors before granting even conditional certification," *State Mutual* at *50, *citing Citicorp*, "or conditional certification for settlement purposes," *id.*, citing *First National Bank of Jasper*, and concluding, "This requirement for a rigorous analysis strongly disfavors *ex parte* conditional certification." *Id.*

[18] *Naef* v. *Masonite* was commenced in 1994, certified by the trial court as a class action (after evidentiary hearing) in November, 1995, removed immediately to the federal court by defendants, remanded to the state court in January 1996, and set to commence trial in August 1996. Subsequent to remand, defendant unsuccessfully sought reconsiderstion and decertification of the class, recusal of the trial court, and removal of class counsel. These motions were denied by the trial court, and class notice was disseminated in March, 1996, with an exclusion (opt out) postmark deadline of July 1, 1996. Defendants sought a stay of notice and decertification of the class through petitions for writs of mandate addressed to the Alabama Supreme Court. On June 28, 1996, these petitions were denied. *Ex Parte Masonite Corp.*, 682 So. 2d 1068 (Ala. 1997). The case proceeded to a bifurcated or phased trial. The first stage addressed the class-wide issue of whether Masonite siding is inherently defective. On September 13, 1996 the jury returned a verdict finding the product defective under the laws of most states. Settlement was reached shortly before the Phase II (liability and damages) trial was set to commence in July 1997. Preliminary approval was granted in September, 1997, and the settlement is scheduled for a final approval hearing on January 14, 1998.

[19] *In re Louisiana Pacific Inner-Seal Siding Litigation*, No. 95–870–JO (D. Oregon).

cern of federalism that, at least in untested areas, the state court developed the substantive state law that will determine the merits of these actions. On the other hand, a simultaneous and countervailing consideration, that of procedural know-how and efficiency, may still favor the federal courts.[20]

I have litigated, tried, and settled class actions in both the federal and state courts. On the whole, as the foregoing examples demonstrate, the state courts are not less able in this regard, although they often have fewer resources than the federal court system and do not have many of the powers that federal courts take for granted. When a defendant headquartered in a particular state has damaged or injured consumers nationwide, in violation of its home state's laws or statutes, it is certainly proper, and may be most practical, to request the courts in that state to certify a nationwide class on those claims. This has traditionally been the province of state courts, and remains so today. Many of the most scholarly, analytical, and enduring class certification decisions, particularly in the area of consumer law, were issued by state courts. *See, e.g., Vasquez* v. *Superior Court*, 4 Cal.3d 800 (California 1971).

However, even in the state common law area of mass torts, there are resources and advantages possessed exclusively by the federal courts, which support a movement for renewed leadership by the federal court system in the area of class actions. Much of the necessary federal legislation, such as the multidistrict statute, 28 U.S.C. § 1407, and the All Writs Act, 28 U.S.C. § 1651, are already in place. Additional legislation to amend Title 28 to provide for federal jurisdiction, regardless of diversity, in instances involving multiple claims arising from a single product or course of conduct, would facilitate the exclusively federal jurisdiction over such claims, and would promote their transfer to, and coordination in, a single federal court for unitary case management and adjudication. There is no reason why multiple courts, or multiple juries, should be called upon to adjudicate the same issues of fact or law over and over. This will continue to happen in the absence of federal mass tort legislation.

I am not suggesting the imposition of a unitary federal statutory or common law of product liability. Substantive tort law has been, and should continue to be, an area for deference to the states. The class action mechanism is procedural, not substantive, and can be applied to the claims of a nationwide class without imposing a single state's law, or a homogenous federal common law, upon the entire class. Numerous courts have utilized subclasses or separate classes to accommodate any variations in the state laws that apply to the class members' claims. While this might seem difficult, and many commentators have emphasized the challenges, in actual practice it has worked well. Circuit decisions that have affirmed trial court nationwide class certification in property-damage/economic loss cases have endorsed the findings of the trial courts that despite variations in state law, classwide treatment of common issues, with the designation of subclasses to address variations, is superior, from the standpoint of efficiency, economy, and fairness, to piecemeal individual litigation. *See, e.g., In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768 (3rd. Cir. 1995); *In re School Asbestos Litigation*, 789 F.2d 996 (3rd. Cir. 1986); *Central Wesleyan College* v. *W. R. Grace & Co.*, 6 F.3d 177 (4th Cir. 1993). In property damage/economic loss cases, the most recent appellate decision on point, the Third Circuit's 1995 *GM* decision recognizes that a comprehensive comparative law exercise may establish predominant commonality justifying nationwide class treatment. As *GM* observed:

> In the *School Asbestos* case, 789 F.2d at 996, the panel asked counsel to analyze all the claims and defenses and write a report reflecting whether the differing claims and defenses evidence a small number of patterns that would be amenable to trial through a series of special verdicts. The plaintiffs came up with a demonstration that the claims and defenses were reducible to four patterns. That, in our view, was sufficient to satisfy the commonality and typicality inquiries. The same might be true in this case. 55 F.3d at 799 n. 22.
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> . . . [T]o the extent that state-by-state variations in procedural laws created legal obstacles, the district court should have considered dividing the action into geographic subclasses instead of considering the entire nationwide class to be hobbled. Additionally, the court should have considered making the inquiry we made in *In re School Asbestos Litig.* 789 F.2d at 1011, as to whether the case,

[20] *See, e.g., In re Abbott Labs*, 51 F.3d 524 (5th Cir. 1995), *reh'g denied, en banc*, 65 F.3d 33 (5th Cir. 1995), (*Abbott Labs* held the federal court's supplemental jurisdiction under 28 U.S.C. § 1367 may abrogate the former *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973) requirement that each class member assert damage claims to separately meet the jurisdictional minimum. Satisfaction by named representative plaintiffs of the $75,000+ diversity jurisdictional may be applied to maintain federal jurisdiction over the entire class of claimants.

in terms of defenses, might fall into three or four patterns so that, with the use of special verdict forms, the case might have been manageable.

We also note that, in other cases, courts have certified nationwide mass tort class actions, which also include myriad individual factual and legal issues, relying on the capacity for a court to decertify or redefine the class subsequently if the case should become unmanageable. *Id.* at 815.

Conclusion

Class actions will continue to play a vital role in protecting investor, consumer, employee, and civil rights in the increasingly complex society of the 21st Century. The modern class action is a uniquely American contribution to the civil justice system and embodies inherently American ideals of equal access, justice, fair play, efficiency, and economy.

Principles of federalism require deference to the substantive laws of the states, but the courts may apply uniform procedural rules, including class action procedures, to preserve the due process rights of all litigants, to expedite unitary adjudication of common issues, and avoid judicial congestion in the mass tort context.

Class actions have moved to state courts because the federal courts have arguably abdicated their leadership role in class actions and complex litigation management: a role for which the federal courts are ideally suited and to which they should return. Our citizens require, and deserve, the renewed leadership of the federal courts in the increased use of class actions in consumer litigation, and the judicious application of class action techniques to common issues in mass tort litigation.

Further revisions to Federal Rule 23 are unnecessary. The Supreme Court's *Amchem* decision provides detailed guidance for the certification and settlement of class actions. The federal courts have the inherent authority and equity jurisdiction to preside over nationwide class actions; should retain the discretion to certify common issues of law and fact for class treatment while reserving other issues (such as specific causation and damages) for individual adjudication; and possess the statutory and procedural tools they require to manage class actions fairly and efficiently.

Mr. COBLE. Thank you Ms. Cabraser. Dr. Hendricks.

STATEMENT OF JOHN B. HENDRICKS, PRESIDENT, ALABAMA CRYOGENIC ENGINEERING, INC.

Mr. HENDRICKS. Thank you for the opportunity to talk to you today. You have reached the non-lawyer component of the panel. I am here today as a member of the U.S. Chamber of Commerce, the world's largest business organization.

It might not be well-known that 96-percent of the Chamber's members are small businesses, and 71-percent have ten or fewer employees. I am a member of the Small Business Council at the U.S. Chamber. Our business is to keep the Council for the Chamber focused on small business issues. We try to do that.

Now, in general, as you probably know, small businessmen are afraid of the legal system. Too often we have seen the result of a life's work go up in smoke of a single lawsuit. That fear is well-founded.

There are other impacts. I am in the research and development business. Almost everything I do, I am involved with a large company. So, if we are going to form some kind of joint venture or some program, we have to visit the legal department. As soon as they find out I am from the State of Alabama, we get the rolling eyes, and the sighs, and then we start negotiating how we can build a fire wall so none of our joint program can come under the jurisdiction of the State courts of Alabama. Alabama has been notorious.

As you members know, elections matter. So, there have been changes in the legal system in the State of Alabama. I think things are coming around. They have suddenly decided that maybe a

scratch on a BMW is not worth $25 million, for one example. Just as this progress is taken, suddenly we find out that Alabama is becoming a speed trap. This is not the policeman behind the billboard. This is our State court system and class actions.

With my printed material, I have submitted a report by Stateside. Now, I really do not know much about this organization. I understand they are located in Northern Virginia. It is a listing of the dockets of some of the State courts in the State of Alabama. I have to say real quickly, do not pick on Alabama too much. The only reason that the Alabama cases are listed is Alabama has a very efficient docketing system. So, this group could find all of the cases.

Now, there are a number of other States that I listed in my written material that probably are just as bad. Because Alabama has an efficient system, they can very easily pick these out. Well, as we have said, in Greene County, I believe, almost 10-percent of the cases that went before the circuit court were class actions.

Well, that immediately catches your attention. Is that necessarily bad? Well, I think once again, as I have found in the past, Alabama is becoming notorious, and perhaps with some justice. So, in the end I think I would ask you, help us out.

Elections do count. We are taking the responsibility for our legal system in the State of Alabama. If people had the opportunity to remove many of these class action cases to Federal court, that would be a big step toward a solution to the problem. Thank you.

[The prepared statement of Mr. Hendricks follows:]

PREPARED STATEMENT OF JOHN B. HENDRICKS, PRESIDENT, ALABAMA CRYOGENIC ENGINEERING, INC.

I thank you for the opportunity to talk with you today about class actions.

I am Dr. John B. Hendricks, the founder and President of Alabama Cryogenic Engineering, Inc., a small research and development company, located in Huntsville, Alabama. I am here today as a member of the United States Chamber of Commerce—the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region. More than 96 percent of our members are small businesses with 100 or fewer employees, 71 percent of which have 10 or fewer employees. I serve on the Chamber's Council on Small Business, the principal advisory body to the Chamber on small business matters.

I have a Ph.D. in Physics from Rice University, a Masters in Physics from Southern Methodist University and a Bachelors of Science in Electrical Engineering from the University of Alabama, in Tuscaloosa. I was a Research Professor of Physics at the University of Alabama, Huntsville from 1972 to 1984. I started Alabama Cryogenic Engineering in 1984 to do research and development in support of activities of the National Aeronautics and Space Administration. Today, the new focus of our business is on developing improvements in medical x-ray systems and in advanced concepts for rocket propulsion. We are a relatively small operation, currently employing four persons. But with a new orientation that is seeking broader commercial application of the technology that we have developed, we are definitely looking to expand.

As a physicist, I am accustomed to going to meetings, talking about cryogenics, and seeing at least some in the group respond with blank stares, having no idea what I am talking about. Today, the tables are turned a little bit. For better or worse, it looks like I am the only non-lawyer appearing before you. On these mass torts and class action issues, I surely do not understand everything that is being said. But this much I can tell you—class actions have become a noose around the neck of American business.

Let me begin by making a heartfelt confession. My home state—Alabama—is a "speed trap." I am not talking about one of those set-ups in which a motorcycle cop hides behind a billboard and then chases after out-of-state folks who drive by going a little over the speed limit. I am talking about a situation in which some lawyers in my home state snare out-of-state companies for a shakedown, even when they

are not doing anything wrong. This shakedown occurs in the form of state court class actions.

In a number of our smaller Alabama counties, class actions have become a major business—a real cottage industry. For example, I grew and went to the University of Alabama in Tuscaloosa County. The county next door—Greene County—is a prime example of where class actions have become big business. Greene County is Alabama's least populated county, and it has always been looking for ways to generate revenue. In the 1950's, when my county was dry, Greene County did a land office business selling liquor until the 1960's, when my county started permitting liquor sales. In the 1980's, Greene County got special permission from the State to open up dog racing tracks—as a way to help a poor county. And now that dog racing is not drawing in the money, Greene County's new business is class actions.

As in a lot of other places, the local courts in Greene County, which are the courts for most everything (divorce pleas, petty theft prosecutions, and dog bite cases), have also become the home of some of the largest, most complicated lawsuits pending in any U.S. court today. And the number of those cases has been growing rapidly in recent years in Greene and in other Alabama counties.

In some of those cases, the claims are for billions of dollars. For example, I understand that there is one case pending in the Circuit Court of Coosa County (the state's third least populous county) in which a few local lawyers are seeking to require the three largest U.S. automakers to refund the cost of all the air bags ever sold. In a lot of courts, those lawyers would have been tossed out on their ears for filing nonsense like that. Not so in Coosa County. Upon receiving the case, the court there immediately certified a class consisting not only of Alabama residents, but of all owners of the millions of air bag-equipped vehicles nationwide. And the court took that step before the auto companies were even told that they had been hit with the lawsuit. (The court has now been required to withdraw its order, but it remains a bad omen.)

Not surprisingly, the lawyers involved have announced publicly that they intend to extend their little lawsuit to include all international auto manufacturers as well. In Alabama, our class action bar does not discriminate against any out-of-state corporation—they'll sue anybody, domestic or foreign.

Why is this happening? Several members of our state plaintiffs' bar have figured out that many of our state trial court judges—all of whom are elected—would be very flexible about class actions if asked to do so. Indeed, "flexible" understates the situation.

Recently, I became aware of a study prepared by an organization called Stateside Associates ("Stateside "). Stateside researches state government issues, and they undertook an effort to go to local courthouses and to get a first-hand look at what was going on with class actions. According to their report (which I am submitting with my testimony), they made inquiry in a number of jurisdictions in which there appear to be a lot of state court class actions—Illinois, Tennessee, Texas, California, Florida, and Alabama.

They soon learned, however, that because of limitations on state court docketing systems (the records that the courts keep about the nature of the cases before them), it was difficult to isolate purported class actions for closer analysis. The major exception was Alabama, in which the state courts have computerized docketing systems that make it relatively easy to figure out which cases on the docket are purported class actions.

Armed with a letter from the Chief Justice of the Alabama Supreme Court asking the cooperation of local court clerks, Stateside researchers visited selected circuit courts around the state to assess the state court class action business. That resulted in the Stateside report, the highlights of which are as follows:

- The number of class actions being filed in Alabama state courts appears to be increasing. For example, the Stateside research indicates that in the Circuit Court of Marengo County, no purported class actions were filed in 1995. But seven class actions were filed in that court during 1996; at least nine were filed there during 1997.
- These purported class actions typically are not disputes between Alabama residents and Alabama companies. The defendants are both major out-of-state corporations (such as Allied-Signal, A.H. Robbins Corp., American Home Products, Associates Financial Services, AT&T, AVCO, BankOne, BellSouth, Carnival Cruise Lines, Chrysler Corporation, Citicorp, Commercial Credit Corp., Federal Express, Ford Motor Company, General Electric, General Motors Corporation, General Motors Acceptance Corporation, Georgia Pacific, H&R Block, Lucent Technologies, Norwest Financial, Prudential Insurance,

Quaker State Corp., State Farm Insurance Companies, Transamerica, and United Technologies).

- The proposed classes in these cases normally are not limited to Alabama residents. Some are nationwide (involving persons from all 50 states); most are multistate actions (involving persons from several states other than Alabama).
- In some counties, class actions comprise a surprisingly large percentage of the total number of cases filed in these courts of general jurisdiction. For example, in recent years, almost 10% of the civil cases filed in the Circuit Court of Greene County, Alabama, were purported class actions.
- The Alabama state courts are acting like federal courts in the sense that the class actions filed there increasingly are being brought by out-of-state counsel. For example, the counsel who filed the purported class actions identified in the Stateside study included attorneys from Arkansas, California, Florida, Illinois, Mississippi (whose state courts do not recognize class actions), Missouri, New York, Pennsylvania, and Texas.

Perhaps the most disturbing finding of the study is that, as I suggested before, some Alabama state court judges show absolutely no restraint in certifying cases for class treatment. Most noteworthy is the lone judge who presides over the Seventh Judicial Circuit of Alabama, which encompasses Greene, Sumter, and Marengo Counties.

Shockingly, Stateside's researchers were unable to find any case over the last three years in which that judge has denied a request that a case be heard as a class action. And during 1996 and 1997, that judge *granted* motions to certify classes in 35 cases. (The other cases were either removed to federal court before the court took any action on class certification issues or were never the subject of a motion for class certification.)

Let me put that number in perspective. I am advised that in 1997, all 900 federal district court judges in the United States *combined* certified a total of only *38* proposed classes.[1] Only *38*. Meanwhile, just one state court judge in Alabama *alone* certified essentially that same number of cases over just a two-year period!

That court is so lax that it apparently is incapable of saying "no" to a class certification motion. And that laxity has become so notorious that the court has become a magnet for purported class actions from counsel both within and without Alabama.

I do not want anybody to leave this hearing with the impression that only Alabama courts serve this "speed trap" role. From my conversations with people who run other companies like mine, I can tell you that this phenomenon is happening in other states, particularly Louisiana, Florida, Tennessee, Illinois, and California. And Alabama lawyers, beginning to worry that they are creating too much notoriety for the Alabama judicial system, have begun filing their purported class actions in the state courts of other jurisdictions.

To conclude, let me make two points:

- *First*, what is going on in Alabama is essentially illegal taxation. If you are an out-of-state company and want to sell a product or provide a service in Alabama, you are likely going to have to pay homage to the local class action bar by becoming a defendant in a purported class action and by ultimately paying attorneys' fees. As such, state court class actions in Alabama are essentially levying on interstate commerce a tax that goes directly into the pockets of the class action lawyers who run the scheme. To say the least, that is bad policy. One way or another, the costs of that tax gets passed on to consumers in the form of higher prices. But more importantly, it offends our federal notions of free interstate commerce. This system of improper taxation has spread to other states, and if unchecked, will spread further. This trend must be stopped, something only Congress can do.
- *Second*, I cannot overemphasize the fear that operators of smaller corporations (particularly companies like mine that are looking to get further involved in the design and manufacture of consumer goods) have about the risk of being hit with a class action. We talk with each other. Bigger companies have some capacity to resist these lawsuits. But when a smaller company is hit, the class counsel come swarming around and tell you that if you do not pay the money they demand for a quick settlement, they will own the keys to your company in short order. In short, the purported class actions often

[1] This figure is based on decisions identified through computerized legal research data bases. Cases against the government and discrimination class actions are excluded from the count.

create settlement pressures that cannot be withstood. When faced with either (a) risking the loss of a business that one has worked so hard to build or (b) entering into a settlement (usually a settlement that provides little meaningful relief for people in the class but big dollars for the lawyers), smaller or mid-sized companies often have no choice but to follow the path of less risk—go ahead and pay off the blackmail demand posed by the class action. Again, this practice must be stopped, something only Congress can do.

This problem is not going to be solved by simply "permitting" Alabama to put its own house in order. That will not happen. And as I stressed before, this is not just an Alabama problem. Lots of state court class actions are being filed elsewhere. Wherever they happen, they make waves well beyond the state where the litigation is filed—the interstate business of an out-of-state company is affected, as well as the affairs of the many unnamed class members who live outside the state where the case is filed.

To address this serious problem, Congress need not take the intrusive step of forcing state courts to change their class action rules or of otherwise meddling in state court affairs. The real problem here is that under the current rules, companies that get sued cannot get their cases moved to federal courts, where there does not seem to be as many of these really bad abuses. Many of these problems would just disappear if the class actions that present big interstate disputes could be heard in federal court if any of the parties want to move them there. It is as simple as that, and I hope Congress makes that happen.

Mr. COBLE. Dr. Hendricks, a case of first impression. You were the first and only member to come under the five-minute wire. I commend you for that.

Mr. HENDRICKS. Well, I was a college professor for a long time. You know, if you do not finish on time, the students just all get up and walk out.

Mr. COBLE. But I repeat, no one was a flagrant abuser. So, I think my friend from Michigan has another meeting pending. So, I will recognize him initially.

Mr. CONYERS. Well I thank all of the members of the panel. Attorney Cabraser, what about opt-in versus opt-out?

Ms. CABRASER. I am not a proponent of opt-in versus opt-out. There were some early experiments to use opt-in class actions. In large scale consumer cases, opt-in class actions do not work because those are the cases that are not feasible for an individual to pursue through a lawyer.

They are the cases in which the class members are most likely to be passive. If you relied on an opt-in class, most of those cases, most of the meritorious cases, simply could not get brought and the company perpetrating the fraud or the unfair business practice would get away with it.

The opt-in class is really a way of conferring immunity on a defendant. Now, there may be some large individual damage class actions, such as some mass tort actions in which an opt-in mechanism could work.

I think courts should have the discretion in certain cases to do that. Some courts believe they do. There is really a de facto opt-in mechanism that works at the claims stage of a class action.

Whether you are a member of the class or not, you do not get your recovery unless you make a claim within the specified time. You are bound by the outcome, but it is your own decision whether to go in and make the claim.

It is all right for judges to use other means, for example, such as surveys, to determine how many people are likely to be interested in a class.

I think courts can be much more creative than they have been about determining at the class certification stage the ultimate question which is, and it is a legitimate question, is this class action really worthwhile?

Can it be administered in such a way to benefit the members of the class? I think that is the question that the rules say needs to be asked at the certification stage. More judges need to feel freer to do just that and put the proponents of the class action to their proof at that time.

Mr. CONYERS. As to approve a tobacco settlement that will exclude future class actions, would you four give us advice on that subject?

Ms. CABRASER. I am counsel of record in a number of tobacco class actions.

Mr. CONYERS. Oh, you are involved.

Ms. CABRASER. So, I am constrained to comment because I am on the litigation, not on the settlement side. My job is to pursue those class actions through certification and trial until something or someone says I cannot. So, that is what I am doing and I have no comment other than that.

Mr. CONYERS. What do you think, Dr. Hendricks? Do you think we ought to preclude future potential class action litigants from being able to pursue that remedy? Remember, in the tobacco cases, that is the only one or two cases that have been won.

Mr. HENDRICKS. Well, my general view is that tobacco, the tobacco business, they were in that business. They knew what they were doing. They should take their chances. That is in a short line.

Mr. CONYERS. "They" being who, the smokers or the industry?

Mr. HENDRICKS. The industry.

Mr. CONYERS. So, does that mean that you are for limiting class actions, if that is in the agreement?

Mr. HENDRICKS. I guess I am here today to say that the class actions in the State courts in the State of Alabama, are corrupting our system.

Mr. CONYERS. You think we ought to limit them.

Mr. HENDRICKS. I think you ought to limit them. If we can move these out, I have nothing against class action suites. I think where they are and how they are being pursued in the State of Alabama is wrong.

Mr. CONYERS. Right. Mr. McGoldrick, what are your views?

Mr. MCGOLDRICK. Congressman, I must say that I do not know the tobacco settlement well enough to give you an answer on that question. I would say this, future classes in some circumstances may be a fully appropriate way to address a class action settlement.

In some cases, I think they are wholly inappropriate and can be part of collusion. That brings me back to my general view which is that you need good, independent, experienced Federal judges who really do take seriously looking at the benefits to the class, as well as the parties before him or her to make that judgment.

So, I certainly would not eliminate out of hand a future class. Whether it fits well in the tobacco case or not, I confess, I cannot say.

Mr. CONYERS. Attorney Martin.

Mr. MARTIN. I do not feel that I can really comment on it because I have not really studied the proposed settlement enough to form a judgment. I would also point out that anybody representing industry would have to disclose some conflict of interest in commenting on that because just as the States have brought suit against the tobacco industry claiming that they have incurred expenses by virtue of the health care that they have had to provide their citizens, that has been exacerbated by tobacco, any major company that provides health care benefits to its employees has, by analogy, occurred similar type expenses. So, this is not an issue on which I would be in a position to provide an objective view.

Mr. CONYERS. Well, Attorney Wellington, I guess you are the only one that can be perfectly candid and forthcoming on this discussion.

Mr. WELLINGTON. Congressman, unfortunately my law firm is on the other side of that litigation from my distinguished colleague down here. Therefore, I have some professional constraints, which I am sure the Congressman understands, given that situation.

I will tell you from a very purely personal standpoint, I have grave concern about limiting the rights of future classes who are not participating in the settlement. I hope, Congressman, you will understand that without commenting on the specific tobacco settlement.

Mr. CONYERS. Well, I would like to thank all of the witnesses, Mr. Chairman. I think they have been very helpful in our discussions.

Mr. COBLE. They have indeed. There is the first bell. Bill, can you get your questions in, in 5 minutes or would you rather come back?

Mr. MR. McCollum. I think I probably can. We can try it. If we do not make it, we can come back.

Mr. COBLE. Well, why do I not recognize the Gentleman from Florida, Mr. McCollum.

Mr. MCCOLLUM. Thank you. I saw an article a few months ago. Then I heard Dick Thornburgh was going to testify today and I looked at his testimony referring to a *Washington Post* piece of May 1997 on the Complex Litigation Committee. I think it is called, CLC.

Somebody provided the subcommittee, maybe in connection with Attorney General Thornburgh's testimony, a copy of the memorandum that is dated September 18, 1995 of this committee's meeting.

Supposedly, it is a committee of several law firms who do a good deal of this plaintiffs' work. Ms. Cabraser, your firm's name appears in numerous occasions in this memorandum about this meeting. I do not know if you have seen the memorandum or even know what I am talking about.

Ms. CABRASER. I do. I have seen it.

Mr. MCCOLLUM. I wonder if you can tell us what the CLC is, who its members are, how members are determined, if there are fees as the article reported to be a member of it, and in what way your firm is involved with it.

Ms. CABRASER. Sure. I can tell you generally. By the way, that was a document that was, of course, meant to be and stay a con-

fidential document. I am not sure how it got out in the public domain.

Certainly, lawyers, whose names appear in that memorandum, have appeared as co-counsel in a number of lawsuits that are a matter of public record. Indeed that was the purpose of that group of lawyers.

We had served and come to know each other a co-counsel in various cases, worked well together, had high respect for each other. We have learned on the plaintiffs' side that to do a class action correctly, and to protect the interest of class members, you have to have personnel, resources and funding or you cannot go the distance in a class action, which is what you have to do to resist a collusive settlement, if you are ever tempted.

We have never been tempted. I am waiting for the day to see how I would respond, but no one has come around with a big envelope full of money yet. We know these class actions are expensive suits. They take time. They take commitment.

This was a way for law firms who worked in the field on an ad hoc basis, on cases that we felt were meritorious, to pool resources. The monetary aspect of that was a simple assessment for common expenses, such as deposition fees, filing fees and other costs that must be paid out. It is not a fee to join. Different members associated with each other on different cases, depending on where the expertise is. I think it is a wonderful thing for the plaintiffs' bar.

On a larger scale, it was done in the Castano Tobacco litigation. The Castano tobacco class action that Mr. Conyers mentioned was only possible because a consortium of 68 law firms came together for purposes of that suit to pool expertise and to share expenses to pursue that suit and the State court suits that followed.

So, we are very proud to be able to do that. It enables us to evaluate the merits of suits, to bring cases that are meritorious, and to litigate them the way they should be litigated for the benefit of the class members.

Mr. MCCOLLUM. Well, the Post referred to an initiation assessment of $10,000 to join the group. That is not accurate?

Ms. CABRASER. Although I am not in charge of writing checks there, I am sure that members were asked to contribute, not only on an initial basis, but on a continuing basis simply because the cases that are done have expenses.

It is not a membership fee. In other words, if you were to come in with $10,000, you would not join the CLC Group. The money is incidental to the purpose of the group.

Mr. MCCOLLUM. Is it a chartered group in any way? I mean is it a 501? Is it an organization of some sort or a corporation or is it just a lose collection of members?

Ms. CABRASER. It is not a corporation or an entity. It is a group of lawyers, not all of whom associate on any particular case. I believe the membership, if you could even call it that, has changed over time.

Mr. MCCOLLUM. You still have meetings then. It is still an ongoing then.

Ms. CABRASER. Not in any formal sense.

Mr. MCCOLLUM. But the law firms involved still get together and still have these kinds of discussions.

Ms. CABRASER. Some of the law firms do get together. The "CLC" people does not.

Mr. MCCOLLUM. Does yours?

Ms. CABRASER. Yes, we meet with some of the firms that were in CLC, but in connection with ongoing cases. It was not like a clearinghouse for potential cases. I think that was really misreported.

Mr. MCCOLLUM. But there have been other memoranda, I assume, of these meetings besides the one that the Post had gotten a hold of. Is that correct?

Ms. CABRASER. There may be case-specific memoranda. I do not know that there are any memoranda like that.

Mr. MCCOLLUM. Okay. So, if we wanted to obtain more memoranda of these meetings, that would be pretty hard to do because they would be confidential and they would be something that you could not provide to us.

Ms. CABRASER. We could not. They are really attorney/client and attorney work product protected documents because they do deal with strategy in ongoing cases.

Mr. MCCOLLUM. Well, I am sure the concern that we have, and you can understand why I have asked the questions, is with the potential appearance of collusion of the various law firms on these kinds of matters in some organized fashion.

The allegations or the implications being made that plaintiffs' firms trying to do these major mass litigation efforts in class actions get together and target various groups to go after, plot, plan, and all of that sort of thing. That is the implication that is there.

Ms. CABRASER. If I could respond to that.

Mr. MCCOLLUM. Please do.

Mr. COBLE. If the Lady would suspend. Bill, the second bell has rung.

Mr. MCCOLLUM. Can she just finish that? Would you mind?

Mr. COBLE. All right.

Mr. MCCOLLUM. I think we can make it and then I will be quiet.

Mr. COBLE. Let us move along quickly then. Then I will return.

Ms. CABRASER. I will be brief. I would think that the bar would be proud to know that there are lawyers that care enough about these issues in class actions to get together to bring meritorious cases, if that is what it takes to go up against the big firms on the defense side in major corporations and do it right. They are not targeting people. We look at cases because people bring cases to our attention: clients, class members, would-be class representatives. Yes, we do investigate. No responsible lawyer brings a lawsuit without investigating to see whether it is meritorious.

Mr. MCCOLLUM. But you do not target groups or say, hey, we are going to divide this up and you guys take this kind of action and we will take that kind?

Ms. CABRASER. No, sir. We do not have the time or energy.

Mr. MCCOLLUM. I would like unanimous consent to introduce into the record a copy of this memorandum.

Mr. COBLE. Without object.

[The memorandum referred to follows:]

STATESIDE ASSOCIATES
FEBRUARY 26, 1998

CLASS ACTION LAWSUITS IN STATE COURTS: A CASE STUDY OF ALABAMA

BACKGROUND

In light of the surge of class action lawsuits filed in state courts in recent years, this study was undertaken to analyze the number and disposition of such cases in selected jurisdictions. Accordingly, late in 1996, a number of states were surveyed—Alabama, California, Illinois, Tennessee, Texas—to determine the feasibility of conducting such an analysis. The states were chosen on the basis of anecdotal reports from lawyers who indicated that an extraordinary number of class actions against out-of-state defendants were being brought in those jurisdictions.

Unfortunately, only one of those states—Alabama—kept its records in a form that made a modest research project feasible. Alabama was chosen for study not to call attention on a single state, but because class actions are easily identifiable in its very accessible courthouse records. The State of Alabama thus serves as a useful prototype of a broader phenomenon now occurring in jurisdictions nationwide.

Between December 1996 and February 1997, trial court records were searched in six of Alabama's 55 counties: Choctaw, Fayette, Greene, Macon, Marengo, and Sumter. Three of these jurisdictions, Greene, Marengo and Sumter, constitute the 7th Judicial Circuit of Alabama, with a single trial judge, the Hon. Eddie Hardaway.

The period researched in Fayette County was 1995-96; for all others it was 1995-97. Research in Choctaw, Macon and Marengo was concluded late in 1997 and may not reflect the entire year. Information produced by this project is reasonably complete but there were a fair number of missing and incomplete files in all counties. *Numbers of class actions and class certifications are, therefore, almost certainly understated.*

Most of the actions filed in the period researched are still pending. Information about them is current only as of the date files were searched. There has been no attempt made to give a complete history of the cases cited.

SUMMARY OF MAJOR FINDINGS

Based on the research, the following results were found:

- A total of 91 putative class actions were found to have been filed in these six rural Alabama counties in the period covered.
- In most of these cases, no action had been taken by the trial court on class certification issues at the time of our review because either the plaintiffs had not moved for class certification or because the matter had been removed to federal court.
- In cases in which the court had ruled on class certification, the motion for class treatment invariably was granted. Classes were certified in 43 cases. And in at least 38 cases, a class was certified *ex parte*, without notice or hearing, usually on the date the complaint was filed, even though Alabama has adopted Rule 23 of the Federal Rules of Civil Procedure verbatim. Thirty of these classes were certified by Judge Hardaway.
- Classes are often loosely defined, but at least 28 appear on their face to be brought on behalf of a putative nationwide class. Many others probably extend well beyond Alabama since classes are frequently defined by reference to transactions ("everyone who did X with Y") without reference to class members' domiciles.
- Many of the primary defendants in these actions are large national companies.[1] In fact, the most striking finding of this report is the frequency with which class actions are brought against national companies—whether they be nationwide, regional or state classes—in the trial courts of this single state.
- Complaints against foreign corporations typically include Alabama companies or individual Alabama residents as codefendants, state that no individual class member seeks or will accept damages, including interest, costs and attorney fees, that are not less than the federal amount-in-controversy (now $75,000), claim no punitive damages, and state that there are no federal

[1] They include, for example, AlliedSignal, American Home Products, Associates Financial Services, AT&T, AVCO, BankOne, Bayer, BellSouth, Carnival Cruise Lines, Chrysler, Citicorp, Commercial Credit Corp., Federal Express, Ford, General Electric, General Motors, General Motors Acceptance Corporation, H&R Block, ITT, Lucent Technologies, Norwest Financial, Prudential Insurance, Quaker State, State Farm, Transamerica, and United Technologies.

causes of action. This appears to permit plaintiffs to avoid removal of their cases to federal courts.

- Venue is often an issue in these cases since many of them have no connection to the county in which they are brought except that service can be made on the defendants there.
- A small number of Alabama plaintiffs' lawyers appear, with one another and with others, in a high percentage of these cases: J.L. Chestnut, Jr., Selma, Alabama (37 times); Andrew P. Campbell, Birmingham, Alabama (24 times); Charles A. McCallum, III, Birmingham, Alabama (15 times); Garve Ivey, Jr., Jasper, Alabama (13 times); Robert G. Methvin, Jr., Birmingham, Alabama (12 times). In the nationwide class actions, there are out-of-state co-counsel from Arkansas, California, Florida, Illinois, Mississippi, Missouri, New York, Pennsylvania, Texas.

I. Choctaw County.

Choctaw County is on the western border of Alabama. Butler is the County seat. Other towns and communities include Bladon Springs and Choctaw. Choctaw County is one of Alabama's largest in area (911 square miles) and smallest in population.

Choctaw is in the First Judicial Circuit made up of Clarke, Choctaw, and Washington counties. Judge J. L. McPherson is the Circuit Judge. He was elected to a six year term in 1994.

A. Summary Of Results

There were five class actions filed in Choctaw County in 1995. Two were dismissed without prejudice; two were removed to federal court. Two, including one pending statewide class, were certified *ex parte*.

Three class actions were filed in 1996. All are nationwide classes and all were certified *ex parte*. One class action was brought in 1997. It is a nationwide class and was certified *ex parte*.

B. 1995 Class Action Filings

95–1. *Ruffin et al.* vs. *Transamerica Financial Services, Inc.*, CV–95–001–P, 1/3/95. Points charged on mortgage loans exceeding statutory limit; fraudulent suppression. Action brought by two named plaintiffs, Alabama residents, against defendant, an Alabama corporation, on behalf of all borrowers from defendant who used property located in Alabama as collateral. Motion to compel arbitration. Dismissed without prejudice, 8/8/97. Plaintiffs represented by Mark Ezell, Ezell & Sharbrough, Mobile.

95–2. *Johnson et al.* vs. *Heilig-Meyers Corp. et al.*, CV–95–065–M, 6/13/95. Providing consumer loans and insurance without a license. Class action brought by two named Alabama residents on behalf of all Alabama residents who purchased household goods from defendant and were provided consumer credit or insurance. Class certified *ex parte*. David Ezell representing class; Lanny Vines representing intervenors.

95–3. *Jones et al.* vs. *Prudential Insurance Co., et al.*, CV–95–117, 9/28/95. Fraud and suppression. Action brought by four named Alabama residents on behalf of a national class consisting of all persons who were insured by defendant under a policy of collateral protection insurance. Asserts there are no federal claims, no claim for $50,000 or more, no claim for punitive damages. Notice of removal filed. Dismissed without prejudice. Lanny Vines and Lloyd Gathings, Emond & Vines, Birmingham, and William Utsey, Utsey, Christopher & Newton, Butler, represented plaintiffs.

95–4. *Henderson et al.* vs. *Georgia Pacific*, CV–95–140, 12/05/95. Products liability. Class certified *ex parte* 12/07/95. Transferred 1/09/96. No file.

95.5. *Foster et al.* vs. *ABT Co. et al.*, CV–95–151, 12/21/95. Class action. No action on certification motion. Case transferred. No file. Plaintiffs represented by Joseph C. Sullivan, Mobile.

C. 1996 Class Action Filings

96–1. *Moon et al.* vs. *Ford Motor Co.*, CV–96–029, 02/08/96. Fraud, product liability, breach of warranty. Action brought by two named Alabama representatives against purchasers of 26 million Ford vehicles with an allegedly defective ignition switch. No punitive damages are claimed; since switch costs $75, no class member has suffered $50,000 in damages. Class certified *ex parte* 2/16/96. Notice of removal. Plaintiffs represented by Mark Ezell, Mobile, and David Guin, Birmingham, and Arkansas, California, New York and Pennsylvania "Of Counsel."

96–2. *Jackson et al.* vs. *Trustmark National Bank, Prudential Property and Casualty Co., and Central National Insurance Co.*, CV–96–049, 4/25/96. Breach of contract, fraud, conspiracy. Action brought by three named Mississippi residents against defendant Alabama, Illinois and New Jersey corporations, on behalf of a nationwide class of all persons who had policies of collateral protection insurance with defendants. Compensatory damages of less than $50,000 for each class member. Nationwide class certified *ex parte* 5/08/96. Notice of removal. Plaintiffs represented by Mark Ezell, Butler, and Joe Whatley, Birmingham.

96–3. *Gourges et al.* vs. *Lomas Mortgage USA, Inc., et al.*, CV–96–062, 05/30/96. Breach of contract, unjust enrichment. Action brought against six national mortgage service firms by two named Alabama residents on behalf of all persons who were party to a residential mortgage loan and were charged a fee to release the lien when they paid off the mortgage. Nationwide class certified *ex parte* 6/07/96. Motions to sever and remove. Plaintiffs represented by Mark Ezell, Butler, Richard Freese, Birmingham, and Joe Whatley, Birmingham.

D. 1997 Class Action Filings

97–1. *Mosley et al.* vs. *A.H. Robbins Co., et al.*, CV–97–014, 09/26/97. Product liability, breach of I warranty. Action brought by two named Alabama residents A.H. Robbins and various Alabama distributors and retailers, on behalf of a class of all Alabama residents who purchased and used "Fen-fan" (sic). Class certified *ex parte* 09/26/97. Plaintiffs represented by John Utsey, Butler, Lloyd Gathings, Birmingham.

II. Fayette County.

Fayette County, Alabama, northwest of Birmingham near the Mississippi border, has a population of 18,081. Fayette is the county seat.

The 24th Judicial Circuit of Alabama comprises Fayette, Lamar and Pickens Counties. James Moore is the Circuit Judge. Judge Moore was appointed to the bench in December 1993 to fill the unexpired term of Judge Clatus Junkin, who had resigned to open a Fayette office of the Jasper, Alabama, law firm of King & Ivey. He was elected to a full term in 1994.

A. Summary of Results

In 1995, 132 civil actions were filed in Fayette County. Seven of these were putative class actions. King & Ivey (Garve Ivey, Jr., and Clatus Junkin) represent the plaintiffs in all seven cases. One class was certified after notice and hearing; one settlement class was certified.

In 1996, 162 civil actions were filed of which six were putative class actions. The file of a seventh case, CV–96–107, which is believed to be a class action, has not been located. As of the date the files were searched, classes had not been certified in any of these actions.

B. 1995 Class Action Filings

95–1. *Woodley et al.* vs. *Protective Life Insurance*, CV–95–005, 01/13/95. Fraud. Two named plaintiffs, a husband and wife, residents of Alabama, on behalf of a nationwide class of all persons who bought credit life insurance from defendant. Complaint states, "This action is brought pursuant to the common law and statutory law of the State of Alabama. No claim is made under any federal statute or for any federal cause of action. No class member has or claims compensatory or punitive damages that equal or exceed $50,000. Each and every class member expressly waives any and all claims to and will not accept damages of whatsoever kind in excess of $50,000." Court's order of 05/10/95 certifies a settlement class of all living Alabama residents who purchased credit life insurance from defendant during the 20 year period prior to commencement of the action, approves a settlement, and awards fees of $5 million to class counsel. Plaintiffs represented by Garve Ivey, Jr., and Clatus Junkin.

95–2. *Cooley* vs. *Life of the South Insurance Co.*, CV–95–024, 03/16/95. Fraud. Named plaintiff, an Alabama resident, on behalf of all persons who bought credit life insurance from defendant. Language quoted above from the *Woodley* complaint is repeated. Latest entry is 5/02/95 notice of filing of motion for removal to Northern District of Alabama. Plaintiffs represented by Garve Ivey, Jr., and Clatus Junkin.

95–3. *Galloway* vs. *U.S. Life Credit Life Insurance Co.*, CV–95–025, 03/16/95. Fraud. Named plaintiff, an Alabama resident, on behalf of all persons who bought credit life insurance from defendant. Language quoted above from the *Woodley* complaint is repeated. On 01/07/97, after hearing, order entered certifying a class of all living Alabama residents who purchased credit life insurance from defendant with speci-

fied terms and conditions during the 20-year period prior to commencement of the action. Plaintiffs represented by Garve Ivey, Jr., and Clatus Junkin.

95–4. *Bush* vs. *Mountain Life Insurance Co.*, CV–95–029, 03/30/95. Fraud. Named plaintiff, an Alabama resident, on behalf of a class of all persons who bought credit life insurance from defendant. Language quoted above from the *Woodley* complaint is repeated. No certification motion or order. Plaintiffs represented by Garve Ivey, Jr., and Clatus Junkin.

95–5. *Kazzire* vs. *Andrew Bynum Oldsmobile and General Motors Corporation*, CV–95–046, 05/03/95. Fraud, breach of contract, breach of warranty (alleged defective paint). Named plaintiff, an Alabama resident, on behalf of a class of all Alabama residents who purchased GMC vehicles from Bynum or others. Complaint amended 05/12/95 to add as defendants all GMC dealers who sold GMC vehicles to Alabama residents during the 20 years prior to commencement of action. Language quoted above from the *Woodley* complaint is repeated in original and amended complaints. 05/22/95, notice of filing for removal to U.S. District Court for Northern District of Alabama, Jasper division. Plaintiffs represented by Garve Ivey, Jr., Clatus Junkin and Andrew P. Campbell, Birmingham, Alabama.

95–6. *Cooley* vs. *Norwest Financial Alabama, Inc. et al.*, CV–95–075, 08/11/95. Fraud. Named plaintiff, an Alabama resident, on behalf of all persons who bought credit life insurance and/or credit disability insurance through defendants. Language quoted above from the *Woodley* complaint is repeated. No certification motion or order. Plaintiffs represented by Garve Ivey, Jr., and Clatus Junkin.

95–7. *Dover* vs. *Standard Furniture Co. of Fayette et al.*, CV–95–081, 08/29/95. Fraud. Named plaintiff, an Alabama resident, on behalf of a class of all persons who bought credit life insurance or property insurance in an amount less than $300 from any defendant. Language quoted from the *Woodley* complaint is repeated. Motion for class certification filed 08/29/95. No certification order. Plaintiffs represented by Garve Ivey, Jr., and Clatus Junkin.

C. 1996 Class Action Filings

96–1. *Brown* vs. *Professional Educators Group and Independent Life Insurance Co.* 12/23/96. Fraud. Named plaintiff, an Alabama resident, on behalf of a class of all persons who bought credit life insurance from defendant. Language quoted above from the *Woodley* complaint is repeated. No certification motion or order. Removal petition filed 02/28/96; papers returned 03/12/96. Plaintiffs represented by Garve Ivey, Jr., and Clatus Junkin.

96–2. *Gray* vs. *Life of the South Insurance Co.* 01/24/96. Plaintiffs represented by Garve Ivey, Jr. Judge Moore had file. Could not get access to it. Class action brought by Garve Ivey for fraud in sale of credit life insurance apparently dismissed on notice of approval of class certification and settlement in *McMahon* vs. *Life of the South Insurance Co.*, CV 95–PT–3373–E, in the Northern District of Alabama, Jasper Division.

96–3. *Taylor* vs. *Edwards Chevrolet Co., General Motors Acceptance Corp.* and *MIC Property & Casualty Insurance Co.*, 0/19/96. Fraud. Named plaintiff, an Alabama resident, on behalf of a class of all customers of GMAC who have been insured by and through MIC. Complaint states: "Notwithstanding any previous allegation or interpretation thereof in this complaint, this action is brought pursuant to the common law and statutory law of Alabama. No claim is made under any federal statute or for any federal cause of action." Plaintiff represented by King, Ivey & Junkin and David Cromwell Johnson, Birmingham, Alabama.

96–4. *Roney* vs. *Commercial Credit Corp. and American Bankers Insurance Co.*, CV–96–016, 01/25/96. Fraud. Named plaintiff, an Alabama resident, on behalf of a class of all customers of Commercial Credit who have been insured by and through American Bankers. Complaint states: "Notwithstanding any previous allegation or interpretation thereof in this complaint, this action is brought pursuant to the common law and statutory law of Alabama. No claim is made under any federal statute or for any federal cause of action. No single class member has or claims compensatory or punitive damages that equal or exceed $50,000.". 05/01/96, removed to U.S. District Court for Northern District of Alabama, Jasper Division. Plaintiffs represented by Garve Ivey, Jr., and Clatus Junkin.

96–5. *Sanford* vs. *American General Finance Inc.*, CV–96–070, 06/06/96. Fraud. Named plaintiff, an Alabama resident, on behalf of a class of all persons who have had installment contracts with defendant upon which credit life and/or term life insurance were written. Motion for class certification, 06/06/96. Ruling on certification

motion deferred until completion of discovery, 09/09/96. Plaintiffs represented by Garve Ivey, Jr., and Clatus Junkin.

96–6. *Jackson* vs. *Concept Cable Systems, Inc., American General Finance, et al.*, CV–96–11, 09/13196. Fraud. Named plaintiff, an Alabama resident, on behalf of a class of all Alabama residents who have bought satellite receiver systems from defendant. 11/07/96, motion to dismiss Concept granted. 02/07/97, motion for certification of a class of "all persons that have entered into transactions at any time in the state of Alabama for purchase of a satellite system that has been financed by American General Finance (or one of its affiliated companies) by issuance of a charge or credit card." Plaintiffs represented by William H. Atkinson, Winfield, Alabama, and Andrew P. Campbell, Birmingham, Alabama.

III. Greene County

Greene County, Alabama, 90 miles southwest of Birmingham, near the Mississippi border, has a population of 10,210. Eutaw, population 3,000, is the county seat.

The Seventh Judicial Circuit of Alabama comprises Greene, Sumter and Marengo Counties. Judge Eddie Hardaway, who lives and works in Sumter County, is the Circuit's only judge. Judge Hardaway was elected to the Circuit Court in 1994, a year after his graduation from the University of Alabama School of Law.

A. Summary Of Results

In 1995, 112 civil actions were filed in Greene County, of which only three were class actions. There are no class certification motions or orders in these three cases.

In 1996, 175 civil actions, were filed, of which at least 16 are class actions; in 1997, 165 civil actions were filed, of which 10 were class actions.

- In 18 of these 26 putative class actions, Judge Hardaway certified the class *ex parte* upon or soon after the filing of the complaint. In one other case, a class was certified after hearing.
- In 12 cases, Judge Hardaway certified a nationwide class.
- In at least 14 of the 25 class actions, plaintiffs are represented by J. L. Chesnut, Jr., of Selma, Alabama.

B. 1995 Class Action Filings

95–1. *Underwood et al* vs. *BellSouth Mobility Inc. and CelluLink, Inc.*, CV–95–014, 03/03/95. Illegal penalty, unjust enrichment. Seven named plaintiffs, all Alabama residents, on behalf of a class of all U.S. citizens who have contracted with defendants for cellular telephone services. File contains no motion for or order of class certification. Plaintiffs represented by J. L. Chesnut, Jr., Selma, AL and T. Roe Frazer II, Jackson, MS.

95–2. *Plowman et al.*, vs. *Bedford Financial Corp. et al.*, CV–95–050, 09/07/95. Fraud. Five named plaintiffs, all Alabama residents, on behalf of a class of persons who received consumer financing of mobile homes through or from defendants. File contains no motion for or order of class certification. Plaintiffs represented by Crownover, Coleman & Standridge, Tuscaloosa, AL, and Turner & Turner, Tuscaloosa, AL.

95–3. *Edward et al.* vs. *Citicorp National Services at al.*, CV–95–059, 07/14/95. Two named defendants, both Alabama residents, on behalf of a class of all persons who purchased collateral protection insurance in connection with the financing of mobile homes by defendants. File contains no motion for or order of class certification. Plaintiffs represented by Crownover, Coleman & Standridge, Tuscaloosa, AL, and Turner & Turner, Tuscaloosa, AL.

C. 1996 Class Action Filings

96–1. *Cain et al* vs. *US HealthTrust*, CV–96–027, 01/28/96. Four named defendants, residents of California, Mississippi and Texas, suing on behalf of all shareholders of EPIC Holdings, Inc., a company acquired by defendant. File contains no motion for or order of class certification. Plaintiffs represented by J. L. Chesnut, Jr., Selma, AL and T. Roe Frazer II, Jackson, MS.

96–2. *Bell et al* vs. *State Mutual Insurance Co. et al.*, CV–96–040, 02/21/96. Fraud. Seven named plaintiffs, Alabama residents, on behalf of all purchasers of policies from defendant with "vanishing premium dividend option." Nationwide class certified 02/21/96 after hearing. Plaintiffs represented by Pritchard, McCall & Jones, Birmingham, AL.

96–3. *Carpenter et al* vs. *State Farm Insurance et al.*, CV–96–057, 04/12/96. Fraud. Six named plaintiffs, residents of DeKalb, Greene, Jackson, Jefferson and Tuscaloosa Counties, Alabama, suing on behalf of all Alabama residents who have purchased homeowners' insurance from the defendant since 1986 and have their homes appraised for that purpose by the defendant. Class certified *ex parte* by Judge Hardaway, 04/19/96. Case transferred, 05/24/96. Plaintiffs represented by R. Jackson Drake, Birmingham, Joe R. Whatley, Jr., Birmingham, Herman A Watson, Jr., Huntsville, Larry W. Morris and Kenneth F. Ingram, Jr., Alexander City.

96–4 *Brown* vs. *Alfa Mut. Ins. Co.*, CV–96–061, 4/19/96. Named plaintiffs, both Alabama residents, suing on behalf of a class of all Alabama residents who presently insure their homes through a policy issued by defendant and all Alabama residents who at any time in prior six years maintained a homeowners insurance policy issued by defendant. Class certified *ex parte* by Judge Eddie Hardaway, 4/19/96. Plaintiffs represented by R. Jackson Drake, Birmingham, Joe R. Whatley, Jr., Birmingham, Herman Watson, Jr., Huntsville, and Larry Morris, Alexander City.

96–5. *Faniel* vs. *Associates Financial Services Co. of Alabama*, CV–96–069, 05/08/96. The named plaintiff, an Alabama resident, suing on behalf of a class of all Alabama residents who had loans refinanced or consolidated by defendant. Class certified *ex parte* by Judge Eddie Hardaway, 08/12/96. Plaintiffs represented by J. L. Chesnut, Jr., Selma, Robert G. Methvin, Jr., Birmingham, and Andrew P. Campbell, Birmingham.

96–6. *Cook et al* vs. *Ford Motor Co. and United Technologies Corp.*, CV–96–090, 06/17/96. Negligence, breach of warranty, conspiracy. Four named plaintiffs, residents of Alabama, Illinois, Iowa and Michigan, suing on behalf of a nationwide class of owners of Ford vehicles with UT ignitions. Nationwide class certified *ex parte* by Judge Hardaway, 06/26/96. Case transferred, 08/08/96. Plaintiffs represented by J. L. Chesnut, Jr., Selma, John M. Deakle, Hattiesburg, MS, Joseph W. Phebus, Urbana, IL, Carey & Daniels, St. Louis, MO, and D. Michael Campbell, Miami, FL.

96–7. *Young et al,* vs. *Prudential Insurance Co.*, CV–96–108, 07/30/96. Breach of fiduciary duty, breach of contract. Four named plaintiffs, residents of Dallas County, AL, Green County, AL, Vineland, NJ and St. Louis, NJ, suing on behalf of a class of all individuals insured by the defendant under Medicare supplement insurance plan since 01/091/91. Nationwide class certified *ex parte* by Judge Hardaway, 08/16/96. Plaintiffs represented by J. L. Chesnut, Jr., Selma, AL, Joseph W. Phebus and Nancy Glidden, Urbana, IL, Carey & Daniels, St. Louis, Mo., John Michael Sims, Heidelberg, MS, David Danis, St. Louis, MO, D. Michael Campbell, Miami, FL.

96–8. *Greene County Newspaper Co.* vs. *Federal Express et al.*, CV–96–117, 08/16/96. Breach of contract, fraud. Three named plaintiffs, Alabama, Illinois and Missouri companies, representing a class of all FedEx customers who shipped goods for a price in which the federal air transportation tax was included after 12/31/96. Nationwide class certified *ex parte* by Judge Hardaway, 08/16/96. Plaintiffs represented by J. L. Chesnut, Jr., Selma, AL, Carey & Danis, St. Louis, MO, Joseph W. Phebus, Urbana, IL., and John M. Deakle, Hattiesburg, MS.

96–9. *Crawford et al* vs. *Combined Insurance Co. et al.*, CV–96–132, 09/20/96. Fraud. Four named plaintiffs, residents of Greene and Tuscaloosa Counties, on behalf of a nationwide class consisting of all purchasers of specified health and accident insurance plans from defendant, an Alabama corporation. Nationwide class certified *ex parte* by Judge Hardaway. 09/20/96. Plaintiffs represented by J. L. Chesnut, Jr., Selma, AL and Ronald 0. Gaiser, Jr., Birmingham, AL.

96–10. *Steele et al* vs. *Prudential Insurance Co.*, CV–96–134, 09/25/96. Fraud. Ten named plaintiffs, residents of Alabama, Illinois and New Jersey, on behalf of all U.S. residents who purchased life insurance policies from defendant between 1985 and 1994 and were victims of an "illegal churning scheme." Nationwide class certified *ex parte* by Judge Hardaway, 09/25/96. Plaintiffs represented by J. L. Chesnut, Jr., Selma, AL, Joseph W. Phebus, Urbana, IL and John M. Deakle, Jr., Hattiesburg, MS.

96–11. *Ash* vs. *Wyeth Laboratories and American Home Products*, CV–96–135, 09/26/96. File unavailable. Appears to be a Norplant class action. Plaintiffs represented by Jonathan H. Waller.

96–12. *Jackson* vs. *Franklin Life Insurance Co.*, CV–96–139, 10/02/96. Fraud. Two named plaintiffs, residents of Greene County, representing a class of all persons who purchased insurance policies from defendant, an Illinois company, based on certain misrepresentations. Nationwide class certified *ex parte* by Judge Hardaway, 01/

10/96. Plaintiffs represented by J. L. Chesnut, Jr., Selma, AL and Ronald 0. Gaiser, Jr., Birmingham, AL.

96–13. *Smith et al* vs. *Durakon Industries et al.*, CV–96–156, 11/07/96. Fraud, negligence, breach of warranty. Fifteen named plaintiffs, residents of Alabama, Florida, Illinois, Michigan and Wisconsin on behalf of a class of all U.S. individuals and entities who are owners of truck "bedliners" manufactured by defendants, five corporations located in Florida, Illinois, Michigan and Wisconsin. Nationwide class certified *ex parte* by Judge Hardaway, 11/07/96. Plaintiffs represented by J. L. Chesnut, Jr., Selma, AL and D. Michael Campbell, Miami, FL.

96–14. *Walters et al* vs. *Lincoln National Life Insurance Com.*, CV–96–157, 11/12/96. Fraud. Two named plaintiffs, Alabama residents, on behalf of a class of all Alsbama residents who are or were members of Locals 351 and 753 of United Steel Workers Union and purchased life insurance from defendant, a foreign corporation. Motion for *ex parte* class certification filed 11/12/96 but no certification order in file. Notice of removal, 12/12/96. Plaintiffs represented by Andrew P. Campbell, and Charles McCallum, II, Birmingham, AL, H. Jerome Thompson, Moulton, AL and J. L. Chesnut, Jr., Selma, AL.

96–15. *Davis et al* vs. *Ouaker State Corp et al*, CV–96–162, 11/18/96. Fraud, breach of warranty, violation of Texas Deceptive Trade Practices Act. Two named plaintiffs, residents of Alabama and Illinois, on behalf of a class of all purchasers of Slick 50 Advanced Formula Engine Treatment manufactured or sold by defendants. Nationwide class certified *ex parte* by Judge Hardaway, 11/18/96. Plaintiffs represented by J. L. Chesnut, Jr., Selma, AL, Joseph W. Phebus, Urbana, IL, D. Michael Campbell, Miami, FL, John M. Deakle, Hattiesburg, MS, John Michael Sims, Heidelberg, MS, John Carey and Joseph Danis and David Danis, St. Louis, MO.

96–16. *Jackson et al* vs. *Lucent Technologies and AT&T*, CV–96–163, 11/18/96. Fraud. Five named plaintiffs, residents of Greene and Hale Counties, Alabama, on behalf of a class of all persons who leased or rented telephone equipment from defendants, foreign corporations headquartered in New Jersey. Nationwide class certified *ex parte* by Judge Hardaway, 11/18/96. Case transferred 12/12/96. Plaintiffs represented by J. L. Chesnut, Jr., Selma, AL and John M. Sims, Heidelberg, MS.

C. 1997 Class Action Filings

97–1. *Williams et al.* vs. *America OnLine*, CV–97–9, 1/24/97. Breach of contract, negligence, fraud, suppression, unjust enrichment. Action brought by named Alabama residents on behalf of a class of all U.S. residents who were denied or delayed in receiving access promised by AOL, or who were negatively opted–into higher priced services by AOL, or who were charged by AOL for supposedly free services. Class conditionally certified *ex parte* 1/28/97. Petition for writ of Mandamus and/or Writ of Prohibition, 4/24/97. Order of Supreme Court of Alabama staying proceedings in the trial court, 4/25/97. Plaintiffs' motion to dismiss with prejudice in order that plaintiffs might "pursue their remedies in the courts of Illinois where a certified class and a proposed settlement in similar litigation are pending," 6/4/97. Order dismissing with prejudice, 7/9/97. Plaintiffs represented by J.L. Chesnut, Jr., and Henry Sanders, Selma, AL.

97–2. *Wesley et al.* vs. *Colonial Pipeline Co.*, CV–97–13, 2/7/97. Negligence, wanton and intentional misconduct, nuisance, strict liability. Action brought by named plaintiffs, residents of Alabama and Georgia, on behalf of all persons owning property adjacent to defendant's allegedly unsafe pipeline, running 5,270 miles from Pasadena, Texas, to Linden, New Jersey. Class conditionally certified *ex parte*, 2/7/97. Plaintiffs represented by Donald V. Watkins, Birmingham, AL., Joe R. Whatley, Jr., Birmingham, AL, Mitchell A. Toups, Beaumont, TX, Dennis C. Reich, Houston, TX, Timothy J. Crowley, Houston, TX.

97–3. *Means* vs. *Gerber Products Co.*, CV–97–58, 3/27/97. Breach of implied warranty, willful misrepresentation, deceit, breach of contract, negligence, unjust enrichment, No class member seeks more than $74,500 in damages, including attorneys fees and costs. Action brought by named plaintiff, an Alabama resident, on behalf of all U.S. persons who purchased Gerber baby food products from January 1988 to the present. (Complaint cites and relies upon a 3/211/97 consent decree entered into between Gerber and the Federal Trade Commission.) No equitable relief or punitive damages are claimed. Class conditionally certified *ex parte*, 3/27/97. Plaintiffs represented by Frederick T. Kuykendall, III, Joe R. Whatley, Jr., and Russell Jackson Drake, Birmingham, AL, and Roger W. Kirby and Peter S. Linden, New York, NY.

97–4. *Smith et al.* vs. *Knoll Pharmaceutical*, CV–97–70, 4/18/97. Unjust enrichment, suppression. Action brought by named plaintiffs, residents of Alabama, New Hampshire and New Jersey, against defendant New Jersey corporation on behalf of a nationwide class of all persons who, since 1/1/90, have purchased defendant's thyroid medication Synthroid, which defendant is alleged to have misrepresented as being superior to generic forms of thyroxine. No federal causes of action are asserted. Class conditionally certified *ex parte*, 4/18/97. Amended complaint, 4/24/97. Nunc pro tunc order reinstating conditional certification, 6/4/97. Plaintiffs represented by Frederick T. Kuykendall, III, Joe R. Whatley, Jr., and Russell Jackson Drake, Birmingham, AL.

97–5. *City of Birmingham and the Greene County Racing Commission* vs. *The American Tobacco Co. et al.*, CV–97–81, 5/28/97. Restitution, indemnity, nuisance. An action brought by the named plaintiffs, a municipal corporation and an Alabama state agency, on behalf of a class of all entities and individuals who have paid for treatment or purchased benefits in connection with illness or death caused by smoking. Notice of removal, 6/13/97. Plaintiffs represented by J.L. Chesnut, Jr., Selma, AL.

97–6. *Smith* vs. *Plantation Pipeline Co.*, CV–97–83, 5/29/97. Breach of contract, negligence, nuisance, strict liability, trespass. Action brought by named plaintiff, an Alabama resident, on behalf of a class of all persons owning property with easements granted to defendant for use of its allegedly hazardous petroleum pipeline, which runs, with "main" and "trunk" lines, from Baton Rouge, LA to a Virginia location near Washington, DC. Motion for conditional certification filed 5/29/97. Notice of removal filed 7/1/97 on grounds of diversity jurisdiction and federal preemption (Hazardous Liquid Pipeline Safety Act). Plaintiffs represented by Frederick T. Kuykendall, III, Birmingham, AL, Mitchell A. Toups, Beaumont, TX, Dennis C. Reich, Houston, TX, and Timothy J. Crowley, Houston, TX.

97–7. *French* vs. *Hurley State Bank*, CV–97–85, 6/9/97. Fraud. Action brought by named Alabama resident against defendant South Dakota corporation on behalf of a class consisting of all persons who have purchased satellite TV systems in Alabama that were financed by defendant. No federal cause of actions are asserted; complaint states that no class member seeks an amount exceeding $74,900; the prayer for relief, however, includes a claim for punitive damages in an unspecified amount. No motion for class certification appears on the record. Notice of removal, 06/30/97, on diversity grounds. Plaintiffs represented by Dennis G. Pantazis, Brian C. Clark, Archie C. Lamb, Jr., and Elizabeth J. Hubertz, Birmingham, AL.

97–8. *Walton* vs. *Independent Fire Insurance Co. et al.*, CV–97–96, 7/30/97. Theft by deception, unjust enrichment. Action brought by named Alabama resident on behalf of a class of Alabama residents who purchased fire insurance policies from defendant with attached endorsements misrepresenting changes in benefits. Class conditionally certified *ex parte* 8/1/97. Plaintiffs represented by Thomas E. Dutton, Kenneth W. Hooks and Chris T. Hellums, Birmingham, AL and Jefferson T. Utsey, Butler, AL.

97–9. *Charleston* vs. *Jim Burke Automotive and AmSouth Bank*, CV–97–124, 10/1/97. Fraud. Class conditionally certified *ex parte* 10/27/97. Plaintiffs represented by Garve Ivey, Jr., Jasper, AL and Thomas J. Methvin, Montgomery, AL. Action brought by named Alabama resident against defendant Alabama corporation on behalf of a class of all persons who have entered into installment contracts with defendants on which credit insurance was included. Class conditionally certified *ex parte* 10/27/97. Plaintiffs represented by Garve Ivey, Jr., Jasper, AL.

97–10. *Gilmore et al.* vs. *Associates Financial Services Co.*, CV–97–158, 12/15/97. Fraud, "flipping." Action brought by named plaintiffs, Alabama residents, on behalf of a class of all Alabama residents who entered into loans with defendant and subsequently had loans refinanced or consolidated by defendant. Motion for conditional class certification, undated. Plaintiffs represented by Robert G. Metvin, Jr., Birmingham, AL, Philip W. McCallum, Birmingham, AL, and Byron T. Ford, Eutaw, AL.

IV. Macon County

Macon County is located in the east-central portion of the state. Tuskegee is the county seat. Other towns include Shorter, Franklin, and Notasulga. The population of Macon County is 24,027.

Macon County is in the 5th Judicial Circuit. There are three judges presiding over the circuit. Judge Lewis H. Hamner, Jr., was elected in 1992 and is up for election next year. Judge Howard Bryan IV was elected in 1994. Judge Philip Segrest was elected in November 1994.

A. Summary Of Results

Of the 263 civil actions filed in 1995, none were class actions. Of 286 civil actions filed in 1996, none were class actions. Of 297 civil actions filed in 1997 (through 12/2), one was a class action.

B. 1997 Class Action

97–1 *Perry* vs. *PrePaid Legal Casualty, Inc.*, CV–97–280, 10/10/97. Fraud. Action brought by named Alabama resident on behalf of class of all Alabama residents who purchased a pre-paid legal plan from defendant. No claim said to exceed $74,500. Class conditionally certified *ex parte* by Judge Bryan on 10/10. Plaintiffs represented by James E. Bridges, Auburn, Walter McGowan, Tuskegee, and Jock Smith, Tuskegee.

V. Marengo County

Marengo County is in the western portion of Alabama. Linden is the county seat. Other towns and communities include Demopolis, Myrtlewood and Sweet Water.

Marengo County is 977 square miles in area. Its estimated 1995 population was 23,602.

Marengo County is a part of the 7th Judicial Circuit of Alabama. The Circuit Judge is Eddie Hardaway.

A. Summary Of Results

In 1995, 183 civil actions were filed in Marengo County. None of these were class actions.

In 1996, 197 civil actions were filed, of which seven were class actions. In 1997, 201 civil actions were filed, of which nine were class actions. Four of these 16 putative class actions were certified, all conditionally and *ex parte*. There were no certification hearings and no other certification orders.

B. 1996 Class Action Filings

96–1. *Taylor* vs. *GMAC and Baugh Chev-Olds, Inc.*, CV–96–013, 01/30/96. Fraud, conspiracy. Action brought by named Alabama resident on behalf of a class of all persons who have entered into installment contracts with Baugh that were financed by GMAC. No certification request. Plaintiff represented by Garve Ivey, who withdrew on 07/18/96 and was replaced by Andrew Campbell and Charles McCallum.

96–2. *Cosby et al.* vs. *Household Retail Services et al.*, CV–96–118, 07/23/96. Fraud, suppression, deceit, breach of contract, conspiracy. Action brought by named Alabama resident on behalf of all persons who have entered into transactions in Alabama to purchase a satellite system financed by HRS. Class certified *ex parte* 08/02/96. Plaintiffs represented by J.L. Chesnut, Jr. , Selma, and Charles A. McCallum, III, Birmingham.

96–3. *Finklea* vs. *BankOne, Dayton, N.A., et al.*, CV 96–122, 07/24/96. Fraud, suppression, conspiracy. Action brought by two named Alabama residents on behalf of an Alabama residents who purchased satellite systems financed by BankOne. Asserts no federal cause of action and makes no individual claim exceeding $49,000 including interest and court costs. Class certified *ex parte* 08/02/96. Class settlement approved 05/28/97. Attorneys for plaintiffs Andrew Campbell and Charles McCallum, Birmingham.

96–4. *Smith* vs. *Norwest Financial Alabama*, CV–96–143, 09/16/96. "Flipping," Fraud, MiniCode violation. Action brought by named Alabama resident against Alabama corporation on behalf of a class of all Alabama residents who entered into loans with defendant which were subsequently refinanced or consolidated. No order on record certifying class. Individual claim settled. Case dismissed. Plaintiffs represented by Robert G. Metvin, Jr., Birmingham, Andrew P. Campbell, Birmingham, and J.L. Chesnut, Jr., Selma..

96–5. *Ramsey* vs. *First Family Financial Services*, CV–96–144, 09/16/96. "Flipping," Fraud, MiniCode violation. Action brought by named Alabama residents against Alabama corporation on behalf of a class of all Alabama residents who entered into loans with defendant which were subsequently refinanced or consolidated. No order on record certifying class. Motion to transfer venue denied. Petition for writ of mandamus filed with Supreme Court. Plaintiffs represented by Robert G. Metvin, Jr., Birmingham, Andrew P. Campbell, Birmingham, and J.L. Chesnut, Jr., Selma.

96–6. *Winston* vs. *Robertson Banking Co. et al.*, CV–96–149. MiniCode violation, fraud, breach of contract. Action brought by named Alabama resident on behalf of all persons who bought credit life insurance from defendants and were unlawfully

charged premiums. No record of class certification. Plaintiff's counsel: David Petway, Birmingham, Andrew Campbell, Birmingham, Charles McCallum, Birmingham.

96–7. *Johnson* vs. *Beneficial Nat'l Bank and Southeast Cable Systems*, CV–96–152, 10/09/96. Fraud, suppression, conspiracy. Action brought by named Alabama resident on behalf of all Alabama residents who purchased satellite systems financed by BNB. Asserts no federal cause of action and makes no individual claim exceeding $49,000 including interest and court costs. No class certification. Case removed and then remanded. Attorneys for plaintiffs Andrew Campbell and Charles McCallum, Birmingham, J.L. Chesnut, Jr., Selma.

C. 1997 Class Action Filings

97–1. *Bridges* vs. *Commercial Credit Corp., Commercial Credit Corp. of Alabama*, CV–97–008, 01/23/97. "Flipping"; fraud. Action brought by named Alabama resident on behalf of a class of all Alabama residents who entered into loans with defendants that were subsequently refinanced or consolidated and all Alabama residents who were sold property insurance by defendants with payments based on total payments of principal and interest. No federal claims; no individual claim exceeding $49,000. Motion for conditional class certification. Motions to transfer venue and to compel arbitration. Plaintiffs represented by Robert G. Methvin, Jr., Birmingham, Andrew P. Campbell, Birmingham, and J.L. Chesnut, Jr., Selma.

97–2. *Pope et al.* vs. *Lynn Goldman, Asa Goldman, Demopolis CATV Co.*, CV–97–052, 03/26/97. Sexual harassment; intentional infliction of emotional distress. Action brought -by named Alabama residents on behalf of a class of all those who have been similarly mistreated by defendant. No class certification request. Plaintiffs represented by John A. Bivens, Tuscaloosa.

97–3. *Thompson* vs. *Frontier Corp. et al.*, CV–97–066, 04/10/97. Fraud and suppression. Action by named Alabama resident against foreign corporations on behalf of a nationwide class of all persons who have been charged for "inside wire maintenance" without affirmative consent. No relief sought under federal law; no individual claim exceeds $ 10,000. Class- certified *ex parte* 04/10/97. Petition for Writ of Mandamus to Court of Civil Appeals denied. Petition for Writ of Mandamus to Alabama Supreme Court filed 08/97. Plaintiffs represented by Mark Edzell, Butler, and T. Roe Frazer II, Jackson, Mississippi.

97–4. *Johnson* vs. *ALFA Life Insurance Co.*, CV–97–68, 04/16/97. Fraud. Action brought by named Alabama residents on behalf of all Alabama residents who purchased "vanishing premium" life insurance policies from defendant ALFA, a domestic corporation. Motions for conditional class certification filed 04/16/97 and 08/04/97. Motion to transfer venue to Wilcox County. Plaintiffs represented by Robert G. Methvin, Jr., Birmingham, J.L. Chesnut, Jr., Selma, and Andrew P. Campbell and Charles A. McCallum, III, Birmingham.

97–5. *Bridges* vs. *State Farm Life Insurance Co. and Kris Mullins*, CV–97–106, 06/11/97. Fraud. Action brought by named Alabama resident on behalf of all Alabama residents who purchased "vanishing premium" life insurance policies from defendant State Farm. No federal causes of action; no individual claims exceeding $74,000. Removed and remanded (fraudulent joinder issue). Plaintiffs represented by Phillip McCallum and Robert G. Methvin, Jr., McCallum & Associates, Birmingham.

97–6. *Johnson* vs. *Beneficial National Bank, Southeast Cable Systems, et al.*, CV–97–120, 07/11/97. Fraud, suppression, conspiracy, etc. Action brought by named Alabama resident against foreign lender and Alabama satellite system installers on behalf of all Alabama residents who purchased satellite television systems that were financed by BNB. Class certified *ex parte* 08/15/97. Settlement stipulation filed 08/15/97 and finally approved 11/17/97. Plaintiffs represented by Andrew Campbell, Birmingham, Charles A. McCallum, III, Birmingham, J.L. Chesnut, Jr., Selma.

97–7. *Fluker* vs. *H&R Block Tax Services, Inc. et al.*, CV–97–149, 09/02/97. Fraud, suppression, breach of fiduciary relationship, unjust enrichment, conspiracy. Action brought by named Alabama resident against H&R Block and named H&R Block Alabama-resident tax preparers on behalf of a class consisting of all persons who have filed an electronic tax return prepared by H&R Block in connection with which H&R Block advanced funds to be paid from an income tax refund. Nationwide class certified *ex parte* 09/02/97. Removal notice filed 10/03/97, raising issue of fraudulent joinder. Plaintiffs represented by Garve Ivey, Jasper, and Jeff Utsey, Butler.

97–8. *Bates* vs. *C&J Manufactured Homes et al.*, CV–97–176, 10/145/97. Fraud, suppression. Action brought by named Alabama residents against Alabama and foreign corporate defendants on behalf of a class all persons who have had an installment

note or security agreement with C&J including credit life insurance. No class certification. Motions to transfer venue filed. Plaintiffs represented by Garve Ivey, Jasper.

97–9. *Salmon* vs. *Heilig Meyers, Inc. et al.*, CV–97–192, 11/13/97. Fraud, breach of contract. Action brought by named Alabama residents on behalf of all those who have been assessed credit life insurance premiums by defendant based on total payments rather than unpaid balance. No class certified as of date of search. Attorneys for plaintiffs Andrew Campbell and Charles McCallum, Birmingham, J.L. Chesnut, Jr., Selma.

VI. Sumter County

Sumter County is located in the west-central part of the state, bordering Mississippi to the west and the Tombigbee River to the east. The county seat is Livingston. Other towns include York, Cuba and Bellamy. The county's population is 16,420 and rapidly declining.

Sumter, Greene and Marengo Counties constitute the Seventeenth Judicial Circuit of Alabama. Judge Eddie Hardaway, the Circuit's lone judge, lives and has his principal office in Sumter County.

A. Summary Of Results

In 1995 there 104 civil actions filed in Sumter County. None were class actions.

In 1996 there were 148 civil actions filed, of which 15 were class actions.

In 1997, there were 161 civil actions. Eight were class actions.

Nine of these 23 class actions were conditionally certified *ex parte*. There do not appear to have been any certifications after notice and hearing.

Seven of these 23 actions involve nationwide classes. Many others may be assumed to involve multistate classes since they define the class in terms of transactions with the defendant company. One action was expressly brought on behalf of Alabama and Mississippi residents.

B. 1996 Class Action Filings

96–1. *Jones* vs. *Interstate Ford, Inc. et al.*, CV–96–15, 1/26/96. Breach of contract, fraud, conspiracy. Named plaintiff, Alabama resident, on behalf of a class of all those who have bought products from Interstate Ford that were financed by Fidelity Financial Services. No motion for class certification on record. Action dismissed without prejudice on 11/20/96 since plaintiff's claims are encompassed by conditionally certified class in *Coates* vs. *Fidelity Financial Services* in the Circuit Court of Washington County. Plaintiffs represented by Garve Ivey, Jr., Jasper, AL, and David Cromwell Johnson and Bruce Petway, Birmingham, AL.

96–2. *Nobles et al.* vs. *W.S. Badcock Corp. et al.*, CV–96–30, 2/27/96. Fraud, breach of contract. Alabama Mini-Code violations. Named plaintiffs, all Alabama residents, on behalf of a class of all persons who entered into transactions in Alabama with defendant and were charged for credit life insurance they had not agreed to buy. No class member has a claim exceeding $49,000. Class conditionally certified, 8/1/96. Order approving settlement and dismissing with prejudice, 11/18/96. Plaintiffs represented by Andrew P. Campbell and Jonathan H. Waller, Birmingham, AL and J.L. Chesnut, Jr., Selma, AL.

96–3. *Brewer* vs. *Campo Electronics et al.*, CV–96–37, 4/3/96. Declaratory and injunctive relief, restitution. Named plaintiff, an Alabama resident, on behalf of all Alabama residents who purchased service contracts from defendants, who had no certificate of authority from the Commissioner of Insurance. Class conditionally certified *ex parte* 4/29/96. Notice of removal, 5/28/96. Plaintiffs represented by G., Daniel Evans and Michael J. Evans, Birmingham, AL.

96–4. *Cashow* vs. *Heilig-Meyers, Inc.*, CV–96–41, 4/12/96. Fraud, Alabama Mini-Code violations; "flipping." Action brought by named plaintiffs, Alabama residents, on behalf of a class of a class of all persons who were forced to refinance one or more loans as a result of defendant's policies. Class conditionally certified *ex parte* 11/26/96. Plaintiffs represented by J.L. Chesnut, Jr., Selma, AL, Andrew P. Campbell, Birmingham, AL, and Robert G. Methvin, Jr., Birmingham, AL.

96–5. *Carter* vs. *Union Security Life*, CV–96–42. Fraud, Alabama Mini-Code violations. Action brought by named plaintiff, an Alabama resident, on behalf of a class of all persons who have bought credit life insurance through defendant. Motion for conditional certification, 4/12/96. No certification order on record. Notice of removal filed, 5/23/96. Plaintiffs represented by J.L. Chesnut, Jr., Selma, AL, and Robert G. Methvin, Jr., Birmingham, AL.

96–6. *Davis et al.* vs. *First Family Financial Services, Inc.*, CV–96–51, 5/24/96. Fraud, breach of contract. Alabama Mini-Code violations, "flipping." Action brought

by named Alabama residents on behalf of a class of all Alabama-resident customers of defendant who were required by defendant's policies to have only one loan from defendant. No class member has a claim exceeding $49,000. Motions for class certification filed 5/24/96 and 8/12/96. No hearings on motions. Dismissed without prejudice, on plaintiffs' motion, 9/17/96. Plaintiffs represented by J.L. Chesnut, Jr., Selma, AL, Robert G. Methvin, Jr., Birmingham, AL, Andrew B. Campbell, Birmingham, AL.

96–7. *Brown* vs. *Chrysler Corp. and AlliedSignal Corp.*, CV–96–56, 6/17/96. Negligence, breach of implied warranty, willful and wanton misconduct, conspiracy. Named plaintiffs, residents of Alabama, Florida and Michigan, on behalf of a class of all purchasers of Chrysler vehicles manufactured 1988–95 with ABS systems manufactured by AlliedSignal. Class conditionally certified *ex parte* 6/17/96. Notice of removal, 7/26/96. Remand order, 8/13/96. Motion to transfer venue, 12/2/96. Defendants' motion for class decertification, 1/13/98. Plaintiffs represented by J.L. Chesnut, Jr., Selma, AL, Joseph W. Phebus and Nancy J. Glidden, Urbana, IL, D. Michael Campbell, Miami, FL, and John Deakle, Hattiesburg, MS.

96–8. *Hand* vs. *First Alabama Bank et al.*, CV–96–60, 6/24/96. Alabama Mini-Code violations; money had and received. Action brought by named defendant, an Alabama resident, on behalf of all Alabama residents who prior to 5/20/96 entered into consumer credit contracts with defendants, gave security interests in personal property, and had single-interest insurance force-placed upon them. Class conditionally certified *ex parte*, 6/24/96. Motions to decertify class and transfer venue, 8/13/96. Order transferring to Circuit Court of Marshall County, 9/12/96. Plaintiffs represented by William C. Brewer, III, Livingston, AL.

96–9. *Paige et al.* vs. *First Colonial Insurance Co. et al.*, CV–96–77, 8/114/97. Fraud, suppression, restitution. Action brought by named plaintiffs, all Alabama residents, on behalf of all Alabama residents who, in connection with credit transactions, were required to purchase property insurance from defendant on principal and interest due rather than on value of collateral. No motion for class certification. Order transferring to Barbour County pursuant to agreement of parties, 4/1/97. Plaintiffs represented by Charles A. McCallum, III, Birmingham, AL, and J.L. Chesnut, Jr., Selma, AL.

96–10. *Anderson* vs. *Commercial Credit Corp.*, CV–96–78, 8/2/96. Fraud, "flipping." Action brought by named Alabama resident on behalf of a class of all Alabama residents who had loans with defendant refinanced or consolidated into subsequent loans by defendant and all Alabama residents who were sold property insurance by defendant with premiums based on total of payments and interest. Motion for class certification, 11/11/96. Motion to compel arbitration, 11/11/96. Order setting 2/4/97 certification hearing, 11/18/96. Order dismissing without prejudice, 2/12/97. Plaintiffs represented by Robert G. Methvin, Jr., Birmingham, AL, Andrew P. Campbell and Charles A. McCallum, III, Birmingham, AL, and J.L. Chesnut, Jr., Selma, AL.

96–11. *Biggers* vs. *ITT Lyndon Property Insurance Co.*, CV–96–079, 8/2/96. Fraud, Alabama Mini-Code violations, "flipping." Action brought by named Alabama resident on behalf of a class of all customers of defendant who were required by defendant's policies to have only one loan from defendant. No class member has a claim exceeding $49,000. No motion for class certification on record. Notice of removal, 9/6/96. Plaintiffs represented by J.L. Chesnut, Jr., Selma, AL, Robert G. Methvin, Jr., Birmingham, AL, Andrew B. Campbell, Birmingham, AL.

96–12. *Gracie Jones* vs. *United Credit Corp*, CV–96–109, 10/7/96. Fraud, Alabama Mini-Code violation ("*McCullar* violation"). Named plaintiff, Alabama resident, on behalf of all persons who bought credit life insurance from defendants and were charged premiums held unlawful in *McCullar* vs. *Universal Underwriters Life* (Ala. 1995). No motion for class certification on record. Plaintiffs represented by D. Bruce Petway, Andrew Campbell and Charles A. McCallum, III, Birmingham, AL.

96–13. *Gracie Jones* vs. *Transamerica Financial Services et al.*, CV–96–110, 10/10/96. Fraud, suppression. Action brought by named Alabama resident on behalf of a class of "all persons who bought insurance from defendants, named and fictitious, and each of them, and were unlawfully charged premiums for said insurance." No class member has a claim exceeding $49,900. No federal causes of action are asserted. No motion for class certification. Notice of removal 11/15/96. Order of remand and dismissal of class claims without prejudice, 1/30/97. Plaintiffs represented by D. Bruce Petway, Andrew Campbell and Charles A. McCallum, III, Birmingham, AL.

96–14. *Gracie Jones* vs. *Merit Life Insurance Co.*, CV–96–111, 10/7/96. Fraud, Alabama Mini-Code violation ("*McCullar* violation"). Named plaintiff, Alabama resident, on behalf of all persons who bought credit life insurance from defendant and were charged premiums held unlawful in *McCullar* vs. *Universal Underwriters Life* (Ala. 1995). No motion for class certification on record. Notice of removal, on diversity grounds and on ground that the claims alleged are identical to those in a putative class action pending in the U.S. District Court for the Northern District of Alabama, *Sanford* vs. *Merit Life*, 11/12/96. Plaintiffs represented by D. Bruce Petway, Andrew Campbell and Charles A. McCallum, III, Birmingham, AL.

96–15. *Lewis et al.* vs. *Exxon Corp.*, CV–96–140. Breach of express warranty, breach of implied warranty, fraudulent misrepresentation. Named plaintiffs, Alabama and New Jersey residents, sue on behalf of all U.S. residents who own or lease vehicles that do not require high octane gasoline and who purchased Exxon Supreme 93 gasoline for use in those vehicles. Nationwide class conditionally certified *ex parte* on 12/3/96. Plaintiffs represented by J. L. Chestnut, Jr., Selma, Alabama, Hank Sanders, Selma, Alabama, Joseph Phebus, Urbana, Illinois, D. Michael Campbell, Miami, Florida, John M. Deakle, Hattiesburg, Mississippi, John Michael Sims, Heidelberg, Mississippi, John Carey, St. Louis, Missouri, Joseph Danis, St. Louis, Missouri, and David Danis, St. Louis, Missouri.

C. 1997 Class Action Filings

97–1. *Dellaveccia et al.* vs. *Bayer Corporation*, CV–97–11, 2/23/97. False and misleading advertising; fraudulent misrepresentation; violation of Pennsylvania Unfair Trade Practices and Consumer Protection Law. Three named plaintiffs, two Alabama residents and one Pennsylvania resident, representing a nationwide class of persons harmed by Bayer's advertising representations that Genuine Bayer Aspirin is superior to generic aspirin. Motion for immediate certification filed with Complaint. Class conditionally certified 3/4/97. Plaintiffs represented by J.L. Chesnut, Jr., Selma, AL, Joseph W. Phebus, Urbana, IL, D. Michael Campbell, Miami, FL, John Deakle, Hattiesburg, MS, Joseph Carey and Joseph Danis, St. Louis, MO, David Danis, St. Louis, MO.

97–2. *Collier* vs. *Magnolia Federal Bank for Savings et al.*, CV–97–13, 2/24/97. Fraud; malicious negligence. Named plaintiff, an Alabama resident, on behalf of a class of all those who have paid for insurance, on mobile homes financed by Magnolia, a Mississippi bank, in amounts greater than the depreciated value of the homes. Notice of Removal, 3/17/97. Plaintiff represented by W. Eason Mitchell, Tuscaloosa, AL.

97–3. *Luke et al.* vs. *Colonial Mortgage Co.*, CV–97–81, 7/2/97. Breach of contract; money had and received. Named plaintiffs, Alabama residents, on behalf of a class of all those who have had residential mortgage loans from defendant and have had to pay fees when lien was released or loan refinanced. Class certified conditionally *ex parte* 7/2/97. Plaintiff represented by Nathan G. Watkins, Jr., Livingston, AL.

97–4 *Paige et al.* vs. *Magnolia Bank for Savings and Magna Mortgage Co.*, CV–97–106, 8/20/97. Breach of contract; money had and received. Named plaintiffs, Mississippi residents, on behalf of a class of Alabama and Mississippi residents who have had residential mortgage loans from Magnolia, serviced by Magna, and have had to pay fees when lien was released or loan refinanced. No motion for class certification on record. Plaintiff represented by Nathan G. Watkins, Jr., Livingston, AL.

97–5. *Nelson et al.* vs. *Carnival Cruise Lines et al.*, CV–97–107, 8/21/97. Fraud. Named plaintiffs, Alabama residents, on behalf of a nationwide class of all U.S. residents who were charged "port charges," during the 20 years preceding filing of the complaint, greater than needed to cover actual dockage costs. No claim is made under any federal statute or federal cause of action; no punitive damages are claimed; no class member claims damages that equal or exceed $75,000. Class conditionally certified *ex parte* 8/21/97. Notice of Removal, 9/22/97. Plaintiffs represented by Jere L. Beasley, Montgomery, AL.

97–6. *Little et al.* vs. *American General Finance et al.*, CV–97–124, 9/12/97. Breach of contract, fraud, suppression, conspiracy. Action by named plaintiffs, Alabama residents, on behalf of a class of all persons who have purchased satellite TV systems financed by American General. Class conditionally certified *ex parte* 10/3/97. Plaintiff's motion for conditional certification expresses concern that defendant will "improvidently remove this case to Federal Court and before such case is remanded, agree to conditional certification in another court, thereby depriving this court of its jurisdiction." Plaintiffs represented by J. L. Chesnut, Jr., Selma, AL, and Robert G. Methvin, Jr., Birmingham, AL.

97–7. *Speight* vs. *AVCO Money By Mail et al.*, CV–97–147, 11/7/97. Fraud, suppression, breach of contract, conspiracy. Named plaintiff, an Alabama resident, on behalf of a class of all those who have purchased household or consumer goods in Alabama that were financed by AVCO. No class member gas a claim greater than $74,000. Motion for conditional class certification, 11/7/97. Notice of Removal, 12/16/97. Remand order of U.S. District Court for want of requisite jurisdictional amount, 1/30/97. Plaintiffs represented by Andrew Campbell and Charles A. McCallum, III, Birmingham, AL, and J.L. Chesnut, Jr., Selma, AL

97–8. *Bankhead* vs. *Household Retail Services, Inc. et al*, CV–97–148, 11/7/97. Fraud, suppression, breach of contract, conspiracy. Named plaintiff, an Alabama resident, on behalf of a class of all those who have purchased household or consumer goods in Alabama that were financed by HRS. No class member has a claim greater than $74,000. Motion for conditional class certification, 11/7/97. Notice of Removal, 12/16/97. Plaintiffs represented by Andrew Campbell and Charles A. McCallum, III, Birmingham, AL, and J.L. Chesnut, Jr., Selma, AL.

Mr. MCCOLLUM. Thank you. Thank you very much, Ms. Cabraser.

Mr. COBLE. Folks, I dislike having to unduly confine you all here, but if you will, give me a few minutes and let me go vote. I have some questions I would like to put to you. We will be back imminently.

[Recess.]

Mr. COBLE. The panel will come back to the table.

I will get you all out of here in due notice, due time. While we are waiting on our own Dr. Hendricks, Mr. McGoldrick and Mr. Martin, let me ask you all a question. Are you all familiar with the 1994-1995 Federal Judicial Center Review of Rule 23? Is that familiar to either one of you?

Mr. MCGOLDRICK. As a general matter, I am.

Mr. COBLE. Let me ask you this and get your response to the conclusion that a ruling—in a reasonably timely manner, particularly for motions to dismiss. What do you all say in response to that? Start off, Mr. McGoldrick.

Mr. MCGOLDRICK. I think that is probably technically and literally true and practically false. The reason is that one often has a considerable delay when one does not know whether one is going to be able to test it or not.

That is precisely the time when there is a lot of arm twisting by judges putting the pressure on for settlement. They will, sometimes, let me be direct, use the carrot or the stick of not addressing case dispositive issues as a way to try to induce settlement. So, I think that is how I would answer that question.

Mr. COBLE. Mr. Martin, do you want to weigh in on that?

Mr. MARTIN. Yes. I would say from my perspective, which has been as an overviewer of our litigation rather than as someone who has been a day-to-day participant, I do not believe that we have had a serious problem with this, at least in Federal courts.

I think we have enjoyed frankly a great deal of success in Federal courts in getting classes denied certification and in getting cases that should be dismissed, dismissed on motion.

Mr. COBLE. Dr. Hendricks, I am very high on the agency that you represent here today. Did you say 96-percent of your members represent small businesses?

Mr. HENDRICKS. With 100 or fewer members. Actually, small businesses, I guess, goes up to 500 members in the Federal court. So, it is even bigger than that.

Mr. COBLE. Yes. Well, I was going to say I would have guessed 80, 88, to 90-percent because I know that the great, great majority consist of small businesses. Has your company, Dr. Hendricks, ever found itself in the role of a party-defendant in a class action suit?

Mr. HENDRICKS. No, we have not, fortunately. Our pockets are not quite deep enough. Maybe that is it.

Mr. COBLE. Ms. Cabraser, if class actions promote consistency of result in our judicial system, as you indicate, why are plaintiffs rushing to file in State courts instead of Federal courts? Is the success of a class action suite now, in the present climate today, is it in large part a function of where the suit is filed?

Ms. CABRASER. I have to speak just from my personal experience.

Mr. COBLE. Okay, that is fine.

Ms. CABRASER. My personal view. There are, I think, as many opinions as there are people in the plaintiffs' complex litigation bar.

I think the move toward State courts, which everyone has noticed, was largely a result of the reluctance of some Federal courts to certify classes when they should. There is also another phenomenon and that is the legitimate use of State courts where you have a company headquartered in a particular State, whose practices emanating from that State can affect people nationwide.

Under those circumstances, that State court obviously has the jurisdiction to certify that class and should be the court dealing with that class, if it is a State law issue. So, I think one part of the State court activity is simply a function that more consumer class actions are being brought. There are no Federal causes of action in those cases.

If they are brought in the right State, that is a perfectly legitimate thing to do. It is going to be true because class actions are equity actions that the personality and philosophy of the judge is going to have a great deal to do with that case; how it is managed, whether or not it is a class action, what type of a class action it is.

There is nothing wrong with that. We need independent judges who are courageous enough to make those tough decisions. There is nothing wrong with wanting to use the best judicial resources we have; whether it is a Judge Weinstein or a Judge Pointer, or a Judge Bechtle in the Federal system.

There are also judges in the State court system who are talented judges, known case managers, great judges and that is part of the reason for filing class action in State court. I think if Congress were to encourage the fuller use of the Federal system in class actions and judges knew that they were expected to regain their leadership in class actions, we could promote consistency of results by returning to the Federal courts.

We would avoid these intrajurisdicational battles that the State courts, no matter how well-intentioned they are, really just do not have the statutory power to prevent.

Mr. COBLE. Mr. McGoldrick's facial response indicates he wants to weigh in on this one.

Mr. MCGOLDRICK. Mr. Chairman, I just wanted to make two points, if I might.

The first is that as we in this noble forum speak in civil ways about how to address problems that we all see and arrive at solu-

tions, I hope it is not lost that many of us, and I certainly count myself in the group, believe that there is truly serious, bad problem with class actions. We need to find ways to address it.

I simply want to emphasize that and mention one thing about the proceedings today. You have heard from professors, from plaintiffs' lawyers, from defense lawyers, from consumer representatives, from business people, from a whole range.

It is striking to me that those of us who frequently disagree—my friend Ms. Cabraser and I frequently disagree—but you have heard from everyone the notion that diversity jurisdiction, increasing the gambit of it to permit class actions, is a good idea. It seems to me that, that is something this committee should weigh heavily in its deliberations.

Mr. COBLE. You all have helped. You and the first panel have helped us tremendously today, I think. Let me briefly conclude. I was not going to get into this area but since other members of the panel did open the door to tobacco, I will say to you all at the outset, I do not come to you completely objective.

I represent tobacco. I live in the tobacco belt. So, having said that, let me think aloud a minute. I find it interesting, hypocritically interesting, that many States are anxious to file their lawsuits, the attorneys generals involved. First of all these States, I am sure, warmly embrace the tax receipts that are forthcoming resulting from the sale of tobacco products.

Oh, they can hardly wait to get their hands on those tax monies. Then they can hardly wait to rush down to the courthouse to file their complaints naming as parties-defendants tobacco companies seeking to win money judgments to defray medical costs that were incurred by people who voluntarily consumed lawful products.

Maybe I am missing something folks. We will not do it today. You folks who may be more intelligent than I might can walk me through why that does not smack of hypocracy and inconsistency bothers me.

This leads me to say, and Mr. Wellington, I think you said earlier, that you would be reluctant to stand in the way of a person seeking his or charting his course to the courthouse to be made whole when damaged, not be his own hand.

This, of course, is going to come into play in the tobacco matters. I can visualize, I hope I am wrong about this, but the possibility of bankruptcy on the part of tobacco companies as a result of intramural litigation against the tobacco industry that may end up pitting the best interests of some plaintiffs against the interests of other plaintiffs.

For example, the interest of one State against interests of another State. I think this is a real problem that confronts us. I am glad we got into that today. I said I was not going to, but I am bothered about the role I just put to you.

Does anybody want to be heard on that? Do you all share my concern about hypocracy? Does anybody want to weigh in on that? If you do not want to, I will give you a free ride on that.

[No response.]

Mr. COBLE. Mr. Wellington, let me conclude by asking you this. I believe you touched on it earlier. To what extent do class notices lacking clarity contribute to inequitable results in class actions?

Ms. CABRASER. Mr. Chairman, we need——

Mr. COBLE. Well, I wanted to hear from Mr. Wellington first.

Ms. CABRASER. All right.

Mr. COBLE. Is this in response to this question, Ms. Cabraser?

Ms. CABRASER. Yes. I am sorry.

Mr. COBLE. Yes. I wanted to hear from Mr. Wellington first.

Mr. WELLINGTON. I think the class notices are a continuing problem. I am struggling here for this reason. I am reluctant to suggest that legislation is the answer. Yet, the problem is a continuing one. All of us have been members of classes where at some point, we have received a notice in the mail. "Welcome, you are a member of a class.

If you want to participate in the class, you do not need to do anything. We will make sure you participate in the economic benefit, whatever it may be. We are not going to take more than a third of the benefit, whatever that may be."

I practice in this area. There are many times when I have great difficulty deciphering what benefit is going to actually be received by the class, how it is going to be determined, how it is going to be calculated, what amount of legal fees are going to be paid, who is paying them, whether the class is paying all of them, some of them out of being deducted from the benefit, or whether the defendant is paying part of them? What I suggested earlier is that generally I believe that kind of confusion is intentional rather than an oversight.

If in fact a class member is told what you are going to get is the 8-cent check that was held up earlier and the plaintiffs' lawyers are going to get $14 million, I do not think people would be as happy about it.

I believe that the responsibility as lawyers, both plaintiffs' and defense lawyers, is to assure that the class members who are actually receiving this notice are being told clearly the truth about what is happening in this class action, which is adjudicating their rights. So, truth to me is paramount and truth has to do an awful lot with clarity of language that John Q. Public and Jane Q. Public can understand.

Mr. COBLE. Did Mr. Frank reveal the amount of attorneys' fees awarded in the case where the 8 cents per claimant was forthcoming? Do you recall whether he did or not? I was going to ask him and I had failed.

Mr. WELLINGTON. I have a sense that it may have been in his submission.

Mr. COBLE. I feel sure it is in his testimony. I wish I had remembered that off-hand. Ms. Cabraser, did you want to be heard on this?

Ms. CABRASER. On the notice issue, yes. There are guidelines for clear communications in class notices. Obviously, class notices need to be clear. The courts tell us that notices need to say the important things to class members in a clear way, including attorneys' fees, what you get, how you get it, what the deadlines are.

One of the problems is that class notices have to fulfill two functions. The first is a communication function, which is an attorney client function and also a public function, but also they have a sec-

ond function to include enough of the legal ease and details of the lawsuit so that they satisfy the defendants.

The courts need that not only has real notice been given to real people, but legal notice has been given for purposes of law. Sometimes those two requirements clash. If lawyers and courts paid more attention to the first aspect, the important aspect, of class notices, which is to communicate clearly, then we would all be better off.

I think the courts are moving in that direction. I have had courts now send notices back to lawyers time and time again saying, it is not clear enough. It is not simple enough. Make this sentence shorter. Put this in bigger type. Make sure that any person on the street will understand the essentials of what this case is about, and if it is a settlement, what the settlement is about so that they can exercise their rights. I am all for that. That is something that we can improve on every day.

Mr. COBLE. Well, I think no good purpose is served when clarity is in fact muzzled. I think the clearer the lines of communication are, the better we will all benefit there from.

Folks, I appreciate you all. Does anybody want to be heard before we drop the gavel?

[No response.]

Mr. COBLE. I thank you all for being here. I thank those in the first panel as well, and those of you who have patiently stayed with us. This subcommittee very much appreciates your contribution. I want to remind you again that the record will remain open for 1 week.

So, if something comes to mind, feel free to submit it to us. This concludes the oversight hearing on Mass Torts and Class Action Lawsuits. I thank you all for your cooperation. This subcommittee stands adjourned.

[Whereupon, at 1:30 p.m., the hearing adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

THE NATIONAL CHAMBER
LITIGATION CENTER,
Washington, DC, March 3, 1998.

Hon. HOWARD COBLE, *Chairman,*
Subcommittee on Courts and
Intellectual Property,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR CHAIRMAN COBLE: Thank you for the opportunity to have Dr. John B. Hendricks', of Alabama Cyrogenics Engineering, Inc, testify on behalf of the U.S. Chamber of Commerce at your hearings on Mass Torts and Class Actions. In connection with Dr. Hendricks' testimony, please note that he has received the following federal grants, contracts or subcontracts in the current and preceding two fiscal years:

1/16/95–1/26/97—NASA, A Novel Approach to Oxidizer Injection in Hybrid Propulsion, NAS8–40556, $597,244, MSFC (Phase 2);

6/28/95–12/30/95—Department of Commerce, A Magic Ring Field Source for Magnetic Refrigeration, 50–DKNB–5–00140, $50,000, NIST (Phase 1);

1/11/96–7/11/96—NASA, An Innovative Concept for Cooling Liquid Propellant Rocket Combustion Chambers, NAS8–40660, $70,000, MSFC (Phase 1);

9/30/96–3/29/97—Health & Human Services (Cancer Institute), An Innovative Method for Producing Anti-Scatter Grids, 1 R43 CA 74732–01, $100,000 (Phase 1);

1/19/96–11/17/98—NASA, An Innovative Concept for Cooling Liquid Propellant Rocket Combustion Chambers, NAS8–97003, $560,510, MSFC (Phase 2).

Also enclosed is a copy of Dr. Hendricks' *curriculum vitae* and company profile. Once again, we appreciate the opportunity for the Chamber to participate in your hearing.

Sincerely,

ROBIN S. CONRAD, *Vice President.*

RULE XI, CLAUSE 2(G)(4) DISCLOSURE

Bristol-Myers Squibb Company submits this disclosure pursuant to House of Representatives Rule XI, clause 2(g)(4), as amended January 7, 1997. Neither Bristol-Myers Squibb Company nor John L. McGoldrick has received any federal grants or contracts in the current or preceding two fiscal years relating to the subject matter of his testimony; i.e., class action abuse and federal diversity jurisdiction.

Bristol-Myers Squibb Company has worked with the federal government in other ways that do not fall within the ambit of House Rule XI clause 2(g)(4), as amended. For example, Bristol-Myers Squibb Company sells a number of its products to a number of federal agencies. Bristol-Myers Squibb Company also has directly received a federal grant for foreign aid.

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